No. 4530

United States

Circuit Court of Appeals

For the Ninth Circuit.

REES T. JENKINS,

Plaintiff in Error,

vs.

J. O. BOYD, as Trustee of the Estate of McCOLLUM-CHRISTY LUMBER COMPANY, a Corporation, Bankrupt,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS.

DALY B. ROBNETT, Esq., 757 Mills Bldg., San Francisco, Calif., and N. J. BARRY, Esq., Reno, Nevada,

Attorneys for Plaintiff in Error.

JOHN W. PRESTON, Esq., Hobart Bldg., MILTON NEWMARK, Esq., Crocker Bldg., and CLARENCE A. SHUEY, Esq., Merchants Exchange Bldg., San Francisco, Calif.,

Attorneys for Defendant in Error.

In the Northern Division of the United States District Court, in and for the Northern District of California.

J. O. BOYD, as Trustee of the Estate of McCOLLUM-CHRISTY LUMBER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

REES T. JENKINS,

Defendant.

COMPLAINT.

To the Honorable District Court of the United States, in and for the Northern District of the State of California:

Now, comes J. O. Boyd, as trustee in bankruptcy of the estate of McCollum-Christy Lumber Company, a corporation, a citizen of the State of Cali-

fornia, residing at Sacramento, California, and brings this, his bill of complaint against Rees T. Jenkins, residing in the County of Lassen, State of California, within the Northern District of California, and for cause of action against said Rees T. Jenkins, defendant, alleges:

I.

That on the 1st day of September, 1922, a petition was filed in the District Court of the United States for the Northern District of California, by certain creditors of the McCollum-Christy Lumber Company, a corporation, in accordance with the acts of Congress relating to bankruptcy, alleging the insolvency of said corporation and praying that said corporation be declared to be a bankrupt in said court, and the said bankruptcy matters duly referred by said court to the Hon. Richard Belcher, one of the referees thereof, residing and having his office in the City of Marysville, before whom, on the 22d day of December, 1922, the first meeting of creditors of the said bankrupt was regularly held, pursuant to due notice, at which [1*] time the complainant was duly elected the trustee of the estate in bankruptcy of said McCollum-Christy Lumber Company, a corporation, bankrupt; that thereafter the said complainant duly qualified as said trustee by filing the bond as required by law, which was duly approved by the above court, and ever since said time the said claimant has been, and is now, the duly elected, qualified and acting trustee of the estate of said

*Page-number appearing at foot of page of original certified Transcript of Record.

McCollum-Christy Lumber Company, a corporation, bankrupt.

II.

That prior to the 6th day of May, 1922, the said bankrupt, McCollum-Christy Lumber Company, a corporation, had been engaged in the business of manufacturing lumber in the County of Plumas, State of California, purchasing timber for said purpose from the above-named defendant, Rees T. Jenkins, under and pursuant to a certain written agreement entered into between the said McCollum-Christy Lumber Company and the said defendant on the 19th day of May, 1920.

III.

That subsequent to the said 19th day of May, 1920, and prior to the said 6th day of May, 1922, the said bankrupt, McCollum-Christy Lumber Company, a corporation, for the purpose of manufacturing lumber from timber purchased from said defendant as aforesaid, erected and placed on lands owned by the said defendant, in the said County of Plumas, certain buildings for the housing of sawmilling machinery, equipment, and the men employed thereat, and placed within said buildings and upon said premises sawmilling machinery, equipment, fixtures, furniture, utensils, steel rails, pipe, tools, together with lumber and other articles of personal property usually and commonly used in and about sawmills and mill camps of a total value of Seventy-five Thousand Dollars ($75,000). [2]

IV.

That on or about the 5th day of April, 1922,

the said Rees T. Jenkins, defendant, commenced an action in the Superior Court of the County of Plumas, State of California, against the said McCollum-Christy Lumber Company, a corporation, asserting and alleging a default, on the part of said corporation, in the terms and conditions of the said agreement entered into as aforesaid on the said 19th day of May, 1920, by reason of the failure of said corporation to make certain payments therein provided for and specified, and praying for a judgment of said court ending and terminating the said agreement, and also asserting and alleging in the complaint in said action that said corporation had, during the life of said agreement, erected upon the lands of said Rees T. Jenkins, defendant herein, one certain sawmill and placed in said sawmill a certain engine and boiler, and that said sawmill was permanently resting upon the lands of said Rees T. Jenkins and that said sawmill, engine and boiler had become and were fixtures upon said lands, and also praying that said sawmill, engine and boiler be declared to be fixtures attached to the said lands and a part thereof.

V.

That thereafter, upon the default of the said McCollum-Christy Lumber Company, a corporation, and upon the application of said Rees T. Jenkins, defendant herein, a decree of the said Superior Court was made and entered therein in accordance with the allegations and prayer of said complaint.

VI.

That thereafter, to wit, on or about the 7th day of May, 1922, the said defendant, Rees T. Jenkins, entered into the possession of the said sawmill, and all of the property theretofore erected, placed or left by the said McCollum-Christy Lumber Company, a corporation, on the lands of said [3] defendant, and did thereafter, to wit, on or about the 15th day of May, 1922, sell and deliver the same to the Bacon-Soule Lumber Company for the sum of Fifty Thousand Dollars ($50,000).

VII.

That during all of the times since the 20th day of May, 1920, the said Rees T. Jenkins, defendant herein, and up to the time the said McCollum-Christy Lumber Company, a corporation, was declared a bankrupt as aforesaid, the said Rees T. Jenkins, defendant, was the duly elected, qualified and acting President of said corporation, McCollum-Christy Lumber Company.

VIII.

That on the 5th day of April, 1922, and for a long time prior to the time of the commencement of said action in the Superior Court of Plumas County as aforesaid, and during the pendency of said action, and at all times thereafter, the said McCollum-Christy Lumber Company, a corporation, was insolvent; that during all of said time the insolvency of said McCollum-Christy Lumber Company was well known to said defendant, Rees T. Jenkins.

IX

That the said McCollum-Christy Lumber Company did not at the time, nor has it since, nor does it now, own any property other than that taken into the possession of the defendant on or about the 7th day of May, 1922, as aforesaid. [4]

X.

That at the time of the commencement of said action as aforesaid by the said defendant against the McCollum-Christy Lumber Company, a corporation, the said corporation was indebted to said defendant as an unsecured general creditor and that said corporation was at said time indebted to various other parties for large sums of money which have never been paid.

XI.

That the value of the sawmill, engine and boiler adjudged as aforesaid by the judgment of the Superior Court of the county of Plumas, to be fixtures attached to the lands of defendant, was comparatively a small portion of the total value of the personal property taken into his possession by the defendant as aforesaid, and by him wrongfully and unlawfully converted to his own use.

XII.

The said defendant wrongfully and unlawfully entered into the possession of said personal property and ever since said time has claimed and asserted, and does now claim and assert, that the same, and the proceeds thereof, were held and retained by him to reimburse and pay him for the indebtedness owed to him by the said McCollum-

Christy Lumber Company, a corporation; that the said personal property was taken into his possession by the defendant within four months prior to the filing of the petition in bankruptcy against the said bankrupt as aforesaid; that the application by defendant of said personal property to the payment of the indebtedness owing to him by the said corporation operated as a preference in favor of said defendant, and has deprived the other creditors of said bankrupt of the same class from recovering any part of the claims due them; that if said preference is allowed to stand the other creditors of said bankrupt will receive nothing upon their respective claims. [5]

XIII.

That by reason of the knowledge had by the said defendant of the insolvent condition of said bankrupt during the transactions hereinabove set forth and his relationship to said bankrupt as the President thereof, all *of* acts of said defendant in recovering and converting said property and obtaining and retaining said preference were, and are, wrongful, unjust, unfair, and fraudulent and done for the purpose of hindering, delaying and defrauding the other creditors of said bankrupt of the same class.

WHEREFORE, complainant prays judgment against said defendant for the value of all of said personal property wrongfully and unlawfully taken, held and converted by him as aforesaid in the sum of Seventy-five Thousand Dollars ($75,-

000), and for interest and costs of suit, and for such other and further relief as may be proper.

CLARENCE A. SHUEY,
Attorney for Plaintiff.

L. H. HUGHES,
Of Counsel. [6]

State of California,
County of Sacramento,—ss.

J. O. Boyd, as Trustee of the estate of McCollum-Christy Lumber Company, a corporation, bankrupt, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and that as to such matters he believes it to be true.

J. O. BOYD.

Subscribed and sworn to before me this 13th day of June, 1923.

[Seal] ALBERT D. SMITH,
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed June 13, 1923. Walter B. Maling, Clerk. By F. M. Lampert, Deputy Clerk. [7]

(Title of Court and Cause—No. 17076.)

AMENDED ANSWER.

To the Honorable District Court of the United States, in and for the Northern District of the State of California.

Now comes the defendant, Rees T. Jenkins, and by leave of court first had and obtained files this, his amended answer to plaintiff's complaint on file herein and admits, alleges and denies as follows:

I.

Answering paragraph III of said complaint, defendant admits that subsequent to the said 19th day of May, 1920, and prior to the said 6th day of May, 1922, the said McCollum-Christy Lumber Company, a corporation, for the purpose of manufacturing lumber from timber purchased from said defendant as aforesaid, erected and placed on lands owned by the said defendant in the said County of Plumas, certain buildings for the housing of sawmill machinery, equipment, and the men employed thereat, and placed within said buildings and upon said premises sawmilling machinery, equipment, fixtures, furniture, utensils, steel rails, pipe, tools, together with lumber and other articles of personal property usually and commonly used in and about sawmills and mill camps, but further alleges that he has no information or belief sufficient to enable him to base a denial, and therefor

basing his denial on his want of such information and belief, denies that said personal property was of a total value or any value of Seventy-five Thousand Dollars ($75,000) or any sum in excess of Fifty Thousand Dollars ($50,000).

II.

Answering paragraph VI of said complaint, defendant denies that thereafter, to wit, on or about the 7th day of May, 1922, or at any time or at all, the said defendant, Rees T. Jenkins, entered into the possession of the said sawmill, and all of the property theretofore erected, or all of the property [8] theretofore erected or any property placed or left by the said McCollum–Christy Lumber Company, on the lands of said defendant, and denies that thereafter, to wit, on or about the 15th day of May, 1922, or at any time, he sold and delivered or sold or delivered the same or any property to the Bacon-Soule Lumber Company for the sum of Fifty Thousand Dollars ($50,000) or any sum whatsoever.

III.

Answering paragraph VII of said complaint, defendant denies that during all of the times since the 20th day of May, 1920, said defendant, and up to the time that said McCollum-Christy Lumber Company, a corporation, was declared a bankrupt, or at any time, the said Rees T. Jenkins was the duly elected, qualified and acting President of said Corporation, and in this behalf alleges that he was in fact elected President of said corporation with

the distinct understanding and agreement, that he would be so only in name and would never be called upon to do or perform any act as such President of the said corporation, or have any responsibility in connection therewith, and further alleges that he never performed an act as President of said corporation, and further alleges that one W. E. Seehorn was at all of said times, the duly elected, qualified and acting Vice-president and Manager of said corporation, and had all and full business control of said corporation, and was at all of said times, the actual acting President of said corporation.

IV.

Answering paragraph IX of said complaint, defendant denies that he ever took into his possession any property of the said McCollum-Christy Lumber Company, or that he was in possession of any property of any kind or character whatsoever of the McCollum-Christy Lumber Company on or about the 7th day of May, 1922, or at any time or at all. [9]

V.

Answering paragraph XI of said complaint, defendant denies that the value of the sawmill, engine and boiler adjudged as aforesaid by the judgment of the Superior Court of the County of Plumas, to be fixtures attached to the lands of defendant, was comparatively or at all, a small portion of the total value of the personal property taken into his possession by the defendant as aforesaid, or otherwise, and denies that he ever wrong-

fully and unlawfully or wrongfully or unlawfully converted the same or any property of said McCollum-Christy Lumber Company to his own use or any use.

VI.

Answering paragraph XII of said complaint, defendant denies that he wrongfully and unlawfully or wrongfully or unlawfully entered into the possession of said personal property or any personal property, and ever since said time has claimed and asserted, or claimed or asserted and does now claim and assert, or claim or assert, that the same, and the proceeds thereof, were held and retained or held or retained, by him to reimburse and pay, or to reimburse or pay, him for the indebtedness owed to him by the said McCollum-Christy Lumber Company, a corporation, other than in the manner hereinafter particularly set forth; denies that the said personal property or any personal property was ever taken into his possession at all; denies that the application by defendant of said personal property or any personal property to the payment of the indebtedness owing to him by the said corporation operated as a preference in favor of said defendant, and denies that he has deprived the other creditors or any creditors of said bankrupt of the same class, or any class, from recovering any part of the claim due them; and denies there ever was any preference in defendant's favor. [10]

VII.

Answering paragraph XIII of said complaint,

defendant denies that he ever had any knowledge of the financial affairs of said bankrupt or that his relationship to said bankrupt as President thereof, gave him any knowledge by which he ever recovered or converted any property of said bankrupt other than as hereinafter particularly set forth, and denies that he obtained and retained or obtained or retained any preference from said bankrupt, and denies that any act on his part in reference to said bankrupt, were and are, or were or are, wrongful, unjust, unfair and fraudulent, or wrongful or unjust or unfair or fraudulent, and denies that any act of his relation to said bankrupt was ever done for the purpose of hindering, delaying and defrauding or hindering or delaying or defrauding the other creditors or any creditors of said bankrupt of the same class, or any class.

As a further, separate and distinct defense to said cause of action, defendant alleges:

VIII.

That on the 19th day of May, 1920, the defendant herein was the owner in the possession and entitled to the possession of about 3,680 acres of land in Grizzly Valley; about 1,080 acres of land in Squaw Valley; about 760 acres of land in Last Chance Valley, all in the County of Plumas, State of California; and that standing and growing upon said lands there was then and there a large amount of merchantable milling, pine, cedar and fir timber.

IX.

That on the said 19th day of May, 1920, defend-

ant Rees T. Jenkins, and one W. E. Seehorn, made and entered into a certain agreement in writing; by the terms of which said agreement said defendant, Rees T. Jenkins, agreed to sell to said W. [11] E. Seehorn, all merchantable milling timber then standing and growing upon said lands.

Said agreement in terms further provided that there should be paid to said defendant on or before the first day of July, 1920, by the said W. E. Seehorn, the sum of $25,000; and that there should be paid to the defendant, by the said W. E. Seehorn, on or before the first day of November, 1920, the sum of $25,000; and that there should be paid to the defendant, by the said W. E. Seehorn, on or before the first day of July, 1921, the sum of $50,000.

That said agreement in further terms provided that time was of the essence of said agreement and that a failure on the part of said W. E. Seehorn to make payments of the sums hereinbefore set forth at the time and in the manner hereinabove and in said agreement provided should be and constitute a breach of said agreement and that then and thereafter said defendant might at his option declare said agreement forfeited and all rights thereunder terminated and ended.

X.

That said agreement in terms provided that the same should apply to and bind the heirs, administrators, successors and assigns of the parties thereto; and that after the making of said agreement, and prior to April 1st, 1922, the same was

by the said W. E. Seehorn sold and assigned, transferred and delivered to the McCollum-Christy Lumber Company and said Company was after the date of said assignment, the successor in interest of said W. E. Seehorn.

XI.

That the said W. E. Seehorn and said McCollum-Christy Lumber Company and each of them, failed to pay to the said defendant, on said April 1st, 1922, said sum of $25,000 or any part thereof, except the sum of $10,000, on or before the first day of July, 1920, or at all, and that they had failed to pay [12] to the said defendant the sum of $25,000, or any part thereof, on or before the first day of November, 1920; and had failed to pay to said defendant said sum of $50,000 or any part thereof, on or before the first day of July, 1921; and said W. E. Seehorn and said McCollum-Christy Lumber Company and each of them, still continued to fail to pay to said defendant said sums hereinabove set forth at the times and in the manner hereinabove set forth, except the sum of $10,000, hereinabove set forth; and that the said McCollum-Christy Lumber Company had cut timber upon said lands of the value of $12,500, in excess of any sums paid to said defendant by the said W. E. Seehorn and said McCollum-Christy Lumber Company or either of them.

XII.

That prior to the said 1st day of April, 1922, the defendant demanded of said McCollum-Christy Lumber Company and said W. E. Seehorn and each

of them, that they pay to him all sums of money due and owing under the terms of said agreement, but that each of them failed and refused so to do, and on said 1st day of April, 1922, still failed and refused to pay to the defendant the sums due and owing under the terms of said agreement, or any part thereof, except the sum of $10,000; as hereinabove alleged, and that thereupon, and prior to the 5th day of April, 1922, defendant exercised his said right and option to declare said agreement terminated and all rights of said W. E. Seehorn and said McCollum-Christy Lumber Company thereunder, including all rights of said W. E. Seehorn and said McCollum-Christy Lumber Company in and to said lands and timber, and in and to any and all fixtures placed thereon or attached thereto, forfeited and terminated, and defendant gave notice to the said W. E. Seehorn and McCollum-Christy Lumber Company, and each of them, that he exercised his option to declare said agreement forfeited and all rights thereunder terminated and ended. [13]

XIII.

That the said McCollum-Christy Lumber Company had erected upon said land one certain sawmill and had placed in said sawmill a certain engine and boiler; that said sawmill and said engine and boiler had and have become and were fixtures upon said land in that said sawmill was and is permanently resting upon said lands; the said engine was and is permanently attached to timbers by nails, bolts and screws and the timber

upon which said engine was and is resting was and is permanently resting upon said lands and said boiler was and is permanently attached to said lands by cement and plaster and was and is encased in a brick and stone wall and which said wall was and is embedded in said lands.

That said sawmill, engine and boiler were erected and placed upon and attached to said lands without any agreement by the said W. E. Seehorn and said McCollum-Christy Lumber Company, or either of them, for the removal thereof.

XIV.

That the said McCollum-Christy Lumber Company is now and at all of the times herein mentioned it was a corporation organized and existing under the laws of the State of Oregon.

XV.

That thereafter and on or about the 23d day of June, 1922, the said defendant sold to one B. C. Soula, the said sawmill, engine and boiler, and the said B. C. Soula thereupon took possession of the same, but that the said defendant did not sell or pretend to sell to the said B. C. Soula, any property of the said McCollum-Christy Lumber Company or any property other than such as had become a fixture on said lands of defendant under the laws of the State of California, and such fact was fully and completely explained to said B. C. Soula at the time of said sale. [14]

For another further, separate, and distinct answer and defense to said complaint of plaintiff

and to the cause of action set forth therein defendant alleges:

I.

That on the 19th of May, 1920, the defendant herein was the owner in the possession and entitled to the possession of about 3,680 acres of land in Grizzly Valley; about 1,080 acres of land in Squaw Valley and about 760 acres of land in Last Chance Valley, all in the County of Plumas, State of California; and that standing and growing upon said lands there was then and there a large amount of merchantable milling, pine, cedar and fir timber.

II.

That on the said 19th day of May, 1920, defendant Rees T. Jenkins, and one W. E. Seehorn, made and entered into a certain agreement in writing, by the terms of which said agreement said defendant, Rees T. Jenkins, agreed to sell to said W. E. Seehorn, all merchantable milling timber then standing and growing upon said lands.

Said agreement in terms further provided that there should be paid to said defendant on or before the first day of July, 1920, by the said W. E. Seehorn, the sum of $25,000; and that there should be paid to the defendant, by the said W. E. Seehorn, on or before the first day of November, 1920, the sum of $25,000; and that there should be paid to the defendant, by the said W. E. Seehorn, on or before the first day of July 1921, the sum of $50,000.

That said agreement in further terms provided that time was of the essence of said agreement

and that a failure on the part of said W. E. Seehorn to make payments of the sums hereinbefore set forth at the time and in the manner hereinabove [15] and in said agreement provided should be and constitute a breach of said agreement and that then and thereafter said defendant might at his option declare said agreement forfeited and all rights thereunder terminated and ended.

III.

That said agreement in terms provided that the same should apply to and bind the heirs, administrators, successors, and assigns of the parties thereto; and that after the making of said agreement, and prior to April 1st, 1922, the same was by the said W. E. Seehorn sold and assigned, transferred and delivered to the McCollum-Christy Lumber Company and said Company was after the date of said assignment, the successor in interest of said W. E. Seehorn.

IV.

That the said W. E. Seehorn and said McCollum-Christy Lumber Company and each of them, failed to pay to the said defendant, on said April 1st, 1922, said sum of $25,000 or any part thereof, except the sum of $10,000, on or before the first day of July, 1920, or at all, and that they had failed to pay to the said defendant the sum of $25,000, or any part thereof, on or before the first day of November, 1920; and had failed to pay to said defendant said sum of $50,000, or any part thereof, on or before the first day of July, 1921; and said W. E. Seehorn and said McCollum-Christy Lumber

Company and each of them, still continued to fail to pay to said defendant said sums hereinabove set forth at the times and in the manner hereinabove set forth, except the sum of $10,000, hereinabove set forth; and that the said McCollum-Christy Lumber Company had cut timber upon said lands of the value of $12,500 in excess of any sums paid to said defendant by the said W. E. Seehorn and said McCollum-Christy Lumber Company or either of them.

V.

That prior to said 1st day of April, 1922, the defendant [16] demanded of said McCollum-Christy Lumber Company and said W. E. Seehorn and each of them, that they pay to him all sums of money due and owing under the terms of said agreement, but that each of them failed and refused so to do, and on said 1st day of April, 1922, still failed and refused to pay to the defendant the sums due and owing under the terms of said agreement, or any part thereof, except the sum of $10,000 as hereinabove alleged, and that thereupon and prior to the 5th day of April, 1922, defendant exercised his right and option to declare said agreement terminated and all rights of said W. E. Seehorn and said McCollum-Christy Lumber Company thereunder, including all rights of said W. E. Seehorn and said McCollum-Christy Lumber Company in and to said lands and timber and in and to any and all fixtures placed thereon or attached thereto, forfeited and terminated and defendant gave notice to the said W. E. Seehorn

and said McCollum-Christy Lumber Company, and each of them, that he exercised his option to declare said agreement forfeited and all rights thereunder terminated and ended.

VI.

That the said McCollum-Christy Lumber Company had erected upon said land one certain sawmill and had placed in said sawmill a certain engine and boiler: that said sawmill and said engine and boiler had and have become and were fixtures upon said land in that said sawmill was and is permanently resting upon said lands: that said engine was and is permanently attached to timbers by nails, bolts and screws and the timber upon which said engine was and is resting was and is permanently resting upon said lands and said boiler was and is permanently attached to said lands by cement and plaster and was and is encased in a brick and stone wall and which said wall was and is embedded in said lands. [17]

That said sawmill, engine and boiler were erected and placed upon and attached to said lands without any agreement by the said W. E. Seehorn and said McCollum-Christy Lumber Company, or either of them, for the removal thereof.

VII.

That the said McCollum-Christy Lumber Company is now and at all of the times herein mentioned it was a corporation organized and existing under the laws of the State of Oregon.

VIII.

That on the first day of September, 1922, peti-

tion was filed in the District Court of the United States in and for the Northern District of California by certain creditors of the McCollum-Christy Lumber Company, a corporation, in accordance with the Acts of Congress relating to bankruptcy, alleging the insolvency of said corporation and praying that said corporation be declared to be bankrupt by said court and thereafter upon proceeding duly and regularly had according to law in said court and matter said McCollum-Christy Lumber Company was adjudged and decreed to be bankrupt and said plaintiff, J. O. Boyd, was duly appointed, elected and qualified as the trustee in bankruptcy of the Estate of said McCollum-Christy Lumber Company, a corporation, and ever since has been and now is the duly appointed, qualified and acting trustee in bankruptcy of the Estate of McCollum-Christy Lumber Company, a corporation bankrupt, as aforesaid.

IX.

That on or about the 5th day of April, 1922, and after said Rees T. Jenkins, defendant herein, had so exercised his option to declare said agreement terminated and the rights of said W. E. Seehorn and said McCollum-Christy Lumber Company, a corporation, thereunder forfeited the said Rees T. Jenkins, as plaintiff commenced an action in the Superior Court of the [18] State of California in and for the County of Plumas, in which said property involved in said contract was situated, against said W. E. Seehorn and said McCollum-Christy Lumber Company, a corporation

as defendant, by filing in said court a complaint in the words and figures following, to wit:

"In the Superior Court of the State of California, in and for the County of Plumas.

REES T. JENKINS,

Plaintiff,

vs.

W. E. SEEHORN and McCOLLUM-CHRISTY LUMBER CO., a Corporation,

Defendants.

COMPLAINT.

Plaintiff complains of the above-named defendants and for cause of action alleges:

I.

That on the 19th day of May, 1920, the plaintiff herein was the owner in possession and entitled to the possession of about 3,680 acres of land in Grizzly Valley, about 1,080 acres of land in Squaw Valley, and about 760 acres of land in Last Chance Valley, all in the County of Plumas, State of California, and that standing and growing upon said lands there was then and there a large amount of merchantable milling pine, cedar and fir timber.

II.

That on the said 19th day of May, 1920, plaintiff, Rees T. Jenkins and defendant W. E. Seehorn made and entered into a certain agreement in writing; by the terms of which said agreement said

plaintiff Rees T. Jenkins agreed to sell to said W. E. Seehorn, his heirs, successors or assigns all [19] merchantable milling timber then standing and growing upon said lands.

Said agreement in terms further provided that there should be paid to said plaintiff on or before the first day of July, 1920, by the said defendant, W. E. Seehorn or his heirs, successors and assigns the sum of $25,000.

That said agreement in further terms provided that time was of the essence of said agreement and that a failure on the part of W. E. Seehorn, his heirs, successors or assigns to make the payment of said sum of $25,000 on or before the first day of July, 1920, should be and constitute a breach thereof and that then or thereafter said plaintiff might at his option declare said agreement forfeited and all rights thereunder terminated and ended.

III.

That after the making of said agreement the same was by the said W. E. Seehorn sold and assigned, transferred and delivered to the defendant, McCollum-Christy Lumber Company, and said company is now the successor in interest of said W. E. Seehorn.

IV.

That the said defendants and each of them failed to pay to the said plaintiff the said sum of $25,000 or any part thereof except the sum of $10,000 on or before the first day of July, 1920, and still continues to fail to pay said sum of $25,000 or any part

thereof except the said sum of $10,000 to the plaintiff.

V.

That prior to the commencement of this action the plaintiff demanded of defendants and each of them that they pay to him all sums of money due and owing under the terms of said agreement, but that defendants and each of them failed and refused and do still fail and refuse to pay to [20] the plaintiff the sums due and owing under the terms of said agreement except the sum of $10,000, as hereinabove alleged and that prior to the commencing of this action the plaintiff gave notice to the said defendants and each of them that he exercised his option to declare said agreement forfeited and all rights thereunder terminated and ended.

VI.

That the defendants have erected upon said land one certain sawmill and have placed in said sawmill a certain engine and boiler; that said sawmill and said engine and boiler have become and are fixtures upon said lands in that said sawmill is permanently resting upon said lands; the said engine is permanently attached to timbers by nails, bolts and screws and the timber upon which said engine is resting is permanently resting upon said lands and said boiler is permanently attached to said lands by cement and plaster and is encased in a brick and stone wall and which said wall is embedded in said lands.

That said sawmill, engine and boiler were erected and placed upon and attached to said lands without

any agreement by the defendants or either of them for the removal thereof.

VII.

That the defendant, McCollum-Christy Lumber Co., is now and at all of the times herein mentioned it was a corporation, organized and existing under the laws of the State of Oregon.

WHEREFORE, plaintiff prays judgment for a decree of this court declaring said agreement forfeited and all rights thereunder terminated and ended, and further declaring that said sawmill and engine and boiler are a part of said lands and are the property of the plaintiff and that the sum of $10,000 paid to the plaintiff by the defendants has become [21] forfeited to the plaintiff; for costs of suit; and for such other and further relief as the Court may seem meet and proper in the premises.

DODGE & BARRY,
Attorneys for the Plaintiff.

State of Nevada,
County of Washoe,—ss.

N. J. Barry, being first duly sworn, deposes and says: That he is attorney for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and that same is true of his own knowledge, except as to those matters which is therein stated upon his information and belief, and as to those matters that he believes it to be true.

Affiant further says that this verification is made by affiant instead of the plaintiff for the reason

that said plaintiff is absent from said county where the affiant resides.

N. J. BARRY.

Subscribed and sworn to before me this 18th day of April, 1922.

[Seal] A. R. SHEWALTER,

Notary Public in and for the County of Washoe, State of Nevada."

X.

That thereafter and on the 6th day of May, 1922, upon proceeding duly and regularly had in said court and cause a judgment and decree was duly given, made and entered in said court and cause which said judgment was and is in the words and figures following, to wit: [22]

"In the Superior Court of the State of California, in and for the County of Plumas.

REES T. JENKINS,

Plaintiff,

vs.

W. E. SEEHORN, and McCOLLUM-CHRISTY LUMBER CO., a Corporation,

Defendants.

JUDGMENT.

In this action the defendants, W. E. Seehorn and McCollum-Christy Lumber Company, a corporation, having been regularly served with process, and having failed to appear and answer the plain-

tiff's complaint filed herein, and the legal time for answering having expired, and no answer or demurrer having been filed, and the default of said defendants, W. E. Seehorn, and McCollum-Christy Lumber Company, in the premises having been duly entered according to law; and the plaintiff having introduced evidence both oral and documentary, and the evidence being closed the cause was submitted to the Court for consideration and decision, and after due deliberation thereon the Court filed its findings and decision in writing, and ordered that judgment be entered herein in favor of the plaintiff in accordance therewith.

WHEREFORE, by reason of the law and the finding aforesaid it is ORDERED, ADJUDGED AND DECREED, and this does order, adjudge, and decree that said agreement of date, the 19th day of May, 1920, between the plaintiff herein and the said defendant, W. E. Seehorn, be and the same is hereby forfeited and all rights therein and thereunder are hereby terminated and ended; and that the sum of $10,000, heretofore paid by the said defendants has become forfeited to the [23] plaintiff; and that the said sawmill, engine and boiler erected upon said land, by the defendants, are and have become a part of said lands and are the property of the said plaintiff; and it is further ordered that the plaintiff do have and recover of and from the defendants his costs herein expended, taxed at the sum of $——.

Done in open court this 6th day of May, 1922.

J. O. MONCUR,
Judge."

XI.

That said judgment has never been reversed, vacated or set aside and no appeal has ever been prosecuted therefrom and the same is now and ever since the entry thereof has been in full virtue and effect.

XII.

That by reason of the facts hereinbefore alleged and by reason of said judgment and decree the said plaintiff herein should be and is debarred and estopped from asserting or attempting to assert any right to the property covered thereby or from maintaining this action against defendant herein, and that the questions presented by plaintiff's complaint herein and the cause of action attempted to be set forth in said complaint is and are *res adjudicata.*

WHEREFORE, defendant prays that plaintiff take nothing by this action and that it be adjudged and decreed that he is estopped and debarred from maintaining said action by reason of said judgment and decree and that defendant have judgment for his costs of suit herein.

N. J. BARRY, Reno, Nevada, and
D. B. ROBNETT, Mills Bldg., San Francisco, Cal.,
Attorneys for Defendant. [24]

State of California,
County of Lassen,—ss.

Rees T. Jenkins, being first duly sworn, deposes and says: That he is the defendant in the above-entitled action; that he has read the foregoing

amended answer and knows the contents thereof and that the same is true of his own knowledge except as to those matters which are therein stated upon his information and belief and as to those matters that he believes it to be true.

REES T. JENKINS.

Subscribed and sworn to before me this 18th day of July, 1924.

[Seal] HARDIN BARRY,

Notary Public in and for the County of Lassen, State of California.

Receipt of the within amended answer admitted this 14th day of August, 1924.

CLARENCE A. SHUEY.

[Endorsed]: Filed August 25, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [25]

In the Northern Division of the United States District Court in and for the Northern District of California.

J. O. BOYD, as Trustee of the Estate of McCOLLUM-CHRISTY LUMBER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

REES T. JENKINS,

Defendant.

AMENDED BILL OF COMPLAINT.

To the Honorable District Court of the United States, in and for the Northern District of the State of California:

Now comes J. O. Boyd, as trustee in bankruptcy of the estate of McCollum-Christy Lumber Company, a corporation, a citizen of the State of California, residing at Sacramento, California, and after leave of Court having been first had and obtained, files this his amended bill of complaint against Rees T. Jenkins, residing in the County of Lassen, State of California, within the Northern District of California, and for cause of action against said Rees T. Jenkins, defendant, alleges:

I.

That on the first day of September, 1922, a petition was filed in the District Court of the United States for the Northern District of California, by certain creditors of the McCollum-Christy Lumber Company, a corporation, in accordance with the acts of Congress relating to bankruptcy, alleging the insolvency of said corporation and praying that said corporation be declared to be a bankrupt in said court, and the said bankruptcy matters duly referred by said Court to the Hon. Richard Belcher, one of the referees thereof, residing and having his office in the City of Marysville, before whom, on the 22d day of December, 1922, the first meeting of creditors of the [26] said bankrupt was regularly held, pursuant to due no-

tice, at which time the complainant was duly elected the trustee of the estate in bankruptcy of said McCollum-Christy Lumber Company, a corporation, bankrupt; that thereafter the said complainant duly qualified as said trustee by filing the bond as required by law, which was duly approved by the above Court, and ever since said time the said claimant has been, and is now, the duly elected, qualified and acting trustee of the estate of said McCollum-Christy Lumber Company, a corporation, bankrupt.

II.

That prior to the 6th day of May, 1922, the said bankrupt, McCollum-Christy Lumber Company, a corporation, had been engaged in the business of manufacturing lumber in the County of Plumas, State of California, purchasing timber for said purpose from the above-named defendant, Rees T. Jenkins, under and pursuant to a certain written agreement entered into between the said McCollum-Christy Lumber Company and the said defendant on the 19th day of May, 1920.

III.

That subsequent to the said 19th day of May, 1920, and prior to the said 6th day of May, 1922, the said bankrupt, McCollum-Christy Lumber Company, a corporation for the purpose of manufacturing lumber from timber purchased from said defendant as aforesaid, erected and placed on lands owned by the said defendant, in the said County of Plumas, certain buildings for the housing of sawmilling machinery, equipment, and the men em-

ployed thereat, and placed within said buildings and upon said premises sawmilling machinery, equipment, fixtures, furniture, utensils, steel rails, pipe, tools, together with lumber and other articles of personal property usually and commonly used in and about sawmills and mill camps of a total value of Seventy-five Thousand Dollars ($75,000). [27]

IV.

That on or about the 5th day of April, 1922, the said Rees T. Jenkins, defendant, commenced an action in the Superior Court of the County of Plumas, State of California, against the said McCollum-Christy Lumber Company, a corporation, asserting and alleging a default, on the part of said corporation, in the terms and conditions of the said agreement entered into as aforesaid on the said 19th day of May, 1920, by reason of the failure of said corporation to make certain payments therein provided for and specified, and praying for a judgment of said Court ending and terminating the said agreement, and also asserting and alleging in the complaint in said action that said corporation had, during the life of said agreement, erected upon the lands of said Rees T. Jenkins, defendant herein, one certain sawmill and placed in said sawmill a certain engine and boiler, and that said sawmill was permanently resting upon the lands of said Rees T. Jenkins and that said sawmill, engine and boiler had become and were fixtures upon said lands, and also praying that said sawmill, engine and boiler

be declared to be fixtures attached to the said lands and a part thereof.

V.

That thereafter, upon the default of the said McCollum-Christy Lumber Company, a corporation, and upon the application of said Rees T. Jenkins, defendant herein, a decree of the said Superior Court was made and entered therein in accordance with the allegations and prayer of said complaint.

VI.

That said judgment and decree was fraudulently obtained in this:

(1) That the defendant herein cause the summons in said action to be served on one W. E. Seehorn, the treasurer and managing agent of said McCollum-Christy Lumber Company, a corporation; [28] that at or about the time said summons was served on said Seehorn, the defendant herein represented to said Seehorn that if he, the said Seehorn, would permit judgment to be entered against the company, the defendant herein would see to it that said Seehorn would be permitted to operate the properties of said company until such time as all of the creditors of said company could be paid off in full; that said representations so made to said Seehorn by the defendant herein were false and fraudulent at the time they were made; and were made without intention of the part of the defendant herein to fulfill the same; and said Seehorn, relying upon said false and fraudulent representations, permitted the default of said corporation defendant to be entered in said

action and permitted judgment in said action to go against said corporation defendant without any defense being made thereto by said corporation defendant.

(2) That the only other person connected with the McCollum-Christy Lumber Company, a corporation, who was informed of the pendency of said action so brought by the defendant herein against said McCollum-Christy Lumber Company, a corporation, was one Geo. F. Christy, the vice-president of said McCollum-Christy Lumber Company, a corporation; that the said Christy was induced by the defendant herein to permit a default to be entered in said suit against said defendant corporation and no defense to be interposed on behalf of said defendant corporation through fraud, connivance and collusion between said defendant herein and said Christy, in that said Christy was, prior to the entry of said judgment and decree and while he was such vice-president, employed for a monetary compensation by the defendant herein to secure a purchaser for the property herein concerned which said prospective purchaser was to purchase said property from the defendant herein as said defendant's individual property and that said Christy did prior to the entry of said judgment and [29] decree procure a purchaser for said property which said purchaser was to purchase the same for the defendant herein and that the defendant did prior to the entry of said judgment and decree give said purchaser so procured as aforesaid an option to purchase said property as if the same was then

and there his individual property; that the compensation of said Christy was dependent upon the consummation of the sale of said property by the defendant herein to the purchaser so procured by him as aforesaid.

(3) That said corporation defendant had at all times herein mentioned and it now has a good and sufficient defense to said action on its merits; in this that said defendant never at any time or at all owned said mill property or any part thereof nor did he at any time have the right to forfeit the title of same or any part thereof to himself and said bankrupt corporation at all times owned, and now owns said property and the whole thereof.

VII.

That thereafter, to wit, on or about the 7th day of May, 1922, the said defendant, Rees T. Jenkins, entered into the possession of the said sawmill, and all of the property theretofore erected, placed or left by the said McCollum-Christy Lumber Company, a corporation, on the lands of said defendant, and did thereafter, to wit, on or about the 15th day of May, 1922, sell and deliver the same to the Bacon-Soule Lumber Company for the sum of Fifty Thousand ($50,000) Dollars.

VIII.

That during all of the times since the 20th day of May, 1920, the said Rees T. Jenkins, defendant herein, and up to the time the said McCollum-Christy Lumber Company, a corporation, was declared a bankrupt as aforesaid, the said Rees T. Jenkins, defendant, [30] was the duly elected, qualified

and acting President of said corporation, McCollum-Christy Lumber Company.

IX.

That on the 5th day of April, 1922, and for a long time prior to the time of the commencement of said action in the Superior Court of Plumas County, as aforesaid, and during the pendency of said action, and at all times thereafter, the said McCollum-Christy Lumber Company, a corporation, was insolvent; that during all of said time the insolvency of said McCollum-Christy Lumber Company was well known to said defendant, Rees T. Jenkins.

X.

That the said McCollum-Christy Lumber Company did not at the time, nor has it since, nor does it now, own any property other than that taken into the possession of the defendant on or about the 7th day of May, 1922, as aforesaid.

XI.

That at the time of the commencement of said action as aforesaid by the said defendant against the McCollum-Christy Lumber Company, a corporation, the said corporation was indebted to said defendant as an unsecured general creditor and that said corporation was at said time indebted to various other parties for large sums of money which have never been paid.

XII.

That the value of the sawmill, engine and boiler adjudged as aforesaid by the judgment of the Superior Court of the county of Plumas, to be fix-

tures attached to the lands of defendant, was comparatively a small portion of the total value of the personal property taken into his possession by the defendant as aforesaid, and by him wrongfully and unlawfully converted to his own use. [31]

XIII.

That said defendant wrongfully and unlawfully entered into the possession of said personal property and ever since said time has claimed and asserted, and does now claim and assert, that the same, and the proceeds thereof, were held and retained by him to reimburse and pay him for the indebtedness owed to him by the said McCollum-Christy Lumber Company, a corporation; that the said personal property was taken into his possession by the defendant within four months prior to the filing of the petition in bankruptcy against the said bankrupt as aforesaid; that the application by defendant of said personal property to the payment of the indebtedness owing to him by the said corporation operated as a preference in favor of said defendant, and has deprived the other creditors of said bankrupt of the same class from recovering any part of the claims due them; that if said preference is allowed to stand the other creditors of said bankrupt will receive nothing upon their respective claims.

XIV.

That by reason of the knowledge had by the said defendant of the insolvent condition of said bankrupt during the transactions hereinabove set forth and his relationship to said bankrupt as the

President thereof, all of the acts of said defendant in recovering and converting said property and obtaining and retaining said preference were, and are, wrongful, unjust, unfair, and fraudulent and done for the purpose of hindering, delaying and defrauding the other creditors of said bankrupt of the same class. [32]

SECOND COUNT.

And for a second, separate and further cause of action, plaintiff complains and alleges:

I.

Plaintiff here refers to paragraph I of his first cause of action and makes it a part hereof for all purposes as if the allegations thereof were here repeated.

II.

That on or about the 15th day of May, 1922, the defendant received the sum of Seventy-five Thousand (75,000) Dollars to and for the use of the McCollum-Christy Lumber Company, a corporation.

III.

That prior to the commencement of this action plaintiff and said McCollum-Christy Lumber Company, a corporation, demanded payment thereof from the defendant.

IV.

That defendant has not paid the same or any part thereof.

THIRD COUNT.

And for a third, separate and further cause of action, plaintiff complains and alleges:

I.

Plaintiff here refers to paragraph I of his first cause of action and makes it a part hereof for all purposes as if the allegations thereof were here repeated.

II.

That on the 7th day of May, 1922, McCollum-Christy Lumber Company, a corporation, was lawfully possessed of certain personal property, to wit, sawmilling machinery, equipment, [33] fixtures, furniture, utensils, steel rails, pipe, tools, lumber and buildings for housing the same, as if its own property, of the value of Seventy-five Thousand (75,000) Dollars.

III.

That on the said day the defendant took and carried away the said goods, and unlawfully converted the same and disposed of the same to his own use, to the damage of the plaintiff and said McCollum-Christy Lumber Company, a corporation, in the sum of Seventy-five Thousand (75,000) Dollars.

WHEREFORE, complainant prays judgment against said defendant for the value of all of said personal property wrongfully and unlawfully taken, held and converted by him as aforesaid in the sum of Seventy-five Thousand (75,000) Dollars, and

for interest and costs of suit, and for such other and further relief as may be proper.

JOHN W. PRESTON,
MILTON NEWMARK and
CLARENCE A. SHUEY,
Attorneys for Plaintiff.

L. V. HUGHES,
Of Counsel. [34]

State of California,
City and County of San Francisco,—ss.

Clarence A. Shuey, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above-entitled action; that he makes this affidavit for and on behalf of said plaintiff for the reason that said plaintiff has his residence in the county of Sacramento and is absent from the city and county of San Francisco, where affiant has his residence and office; that affiant has read said foregoing amended bill of complaint and knows the contents thereof; that the same is true of his own knowledge, save and except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

CLARENCE A. SHUEY.

Subscribed and sworn to before me this 15th day of November, 1924.

[Seal] C. B. SESSIONS,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 15, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [35]

United States District Court, California.

No. 17,076.

BOYD, Trustee of Bankrupt,

vs.

JENKINS.

(DECISION.)

The case is simple enough. The facts free from material conflict, and little detail of evidence is required—from a busy trial court. The contract between defendant and bankrupt created a mixed relation between them in some part that of vendor and vendee, landlord and tenant, and licensee. To enjoy the premises exclusively for ten years growth of timber, portions likewise for mills and other facilities of enjoyment of the purchase, created a tenancy despite negative words in the contract. Terms, not labels, give character to relations. But whether tenancy or mere license, local as well as general law attached right to remove mill and other facilities within or at end of contract period; and nothing in the contract indicates any contrary intent in the parties. In so far as the forfeiture clause upon default in first payment goes, no default occurred and the clause is not material.

Likewise immaterial is the question whether re-

moval must occur *before* contract terminated or could be done *after* that time. The reason subsists in the relations between defendant and bankrupt,—the former president of the latter and also owner of the land on which were mill, etc.

For his duty, as president, to guard the interests of the then insolvent bankrupt—insolvency known to him and its creditors, required that he timely cause to be removed, if necessary, the mill etc. Failing to do so, [36] he cannot take advantage of this his wrong, and successfully assert that as owner of the land he became owner of the mill etc., by reason of his failure to timely cause them to be removed as was his duty as aforesaid.

This is elementary and the principle is illustrated by innumerable cases, corporation and others. So it is immaterial here, whether the contract was really terminated, whether the bankrupt owes anything to defendant, or *vice versa,* for breach. The duty of defendant is the same in any case. So far as time was of essence, defendant waived it by delay after default, by consent to changes and modifications, by recognizing continuance of the contract, and by demand for payment as of a debt due. As before stated, no forfeiture occurred. Hence, the judgment based thereon and procured in a state court by defendant upon allegations that he had not been paid the first payment, is founded upon falsehood, collusion and fraud, and defendant will be permitted no benefit or advantage by reason of it.

See Smith vs. Smith, 224 Fed. 3, and cases by it cited.

Incidentally, the proceedings of that judgment could well be the basis of other proceedings by the state court and public prosecutor.

In respect to logs and lumber on hand, they were not counted upon in the case as brought and tried, and are not *here,* at least, to be taken into account.

If any of defendant's timber was converted and by labor transformed into buildings by the bankrupt, its value does not appear and no account can be taken of it. The evidence is ample that defendant seized and possessed, exercised dominion over, converted and contracted to sell the mill and all the bankrupt's property upon the [37] premises and of value $50,000.

That he later executed a bill of sale that *may* exclude some, is too late, does not cure conversion, and is immaterial. The Court finds for plaintiff and against defendant, in amount $50,000, legal interest from June 23, 1922, and costs, and therefrom concludes plaintiff is entitled to recover of and from defendant accordingly. If defendant desires more specific findings, plaintiff will submit them to conform hereto and no notice. So far as necessary, the amended complaint is allowed.

Judgment accordingly.

Dec. 13, 1924.

BOURQUIN, J.

[Endorsed]: Filed Dec. 15, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [38]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 17,076.

J. O. BOYD, as Trustee of the Estate of McCOLLUM–CHRISTY LUMBER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

REES T. JENKINS,

Defendant.

JUDGMENT.

This cause having come on regularly for trial on the 14th day of November, 1924, before the Court sitting without a jury, a trial by jury having been especially waived by written stipulation filed; Clarence A. Shuey, John W. Preston and Milton Newmark, Esqrs., appearing as attorneys for plaintiff and N. J. Barry and D. V. Robnett, Esqrs., appearing as attorneys for defendant; and the trial having been proceeded with on the 15th day of said month and oral and documentary evidence having been introduced on behalf of the respective parties, and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having filed its decision and ordered that judgment be entered herein in favor of the plaintiff and against the defendant for the sum of $50,000.00, together

with interest from June 23, 1922, at seven per cent per annum and for costs.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that J. O. Boyd, as trustee of the estate of McCollum-Christy Lumber Company, a corporation, bankrupt, plaintiff, do have and recover of and from Rees T. Jenkins, defendant, the sum of Fifty-eight Thousand Six Hundred Seventy-two and 22/100 ($58,672.22) Dollars, together with his costs herein expended taxed at $——.

Judgment entered December 15, 1924.

WALTER B. MALING,
Clerk. [39]

In the Southern Division of the United States District Court in and for the Northern District of California.

No. 17,076.

J. O. BOYD, as Trustee of the Estate of McCOLLUM–CHRISTY LUMBER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

REES T. JENKINS,

Defendant.

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the trial of this cause in this court on the 14th day of Novem-

ber, the Honorable G. M. Bourquin, Judge, presiding, when the following proceedings were had, to wit:

Thereupon, the plaintiff to sustain the issue upon his part offered and the Court received the following testimony of the following witnesses, and the following documentary evidence, in chief:

Counsel for plaintiff offered in evidence copy of contract, dated May 19th, 1920, between Rees T. Jenkins of Reno, Nevada, party of the first part and W. E. Seehorn of Klamath Falls, Oregon, the party of the second part, which was admitted in evidence and marked Plaintiff's Exhibit 1, [40] and is as follows:

PLAINTIFF'S EXHIBIT No. 1.

"THIS AGREEMENT made and entered into this 19th day of May, 1920, by and between Rees T. Jenkins of Reno, Nevada, party of the first part, and W. E. Seehorn, of Klamath Falls, Oregon, party of the second part:

WITNESSETH:

That for and in consideration of the sum of One Dollar ($1.00) paid by second party to first party, the receipt whereof is hereby acknowledged, and of the further payments to be made as hereinafter stated, said first party hereby grants to said second party, or his assigns, a right and option to purchase from said first party or his assigns, all the merchantable milling timber on the lands owned by said first party in Plumas County, California, and

situate, lying and being in the following localities, viz.:

The said timber on about three thousand six hundred and eighty (3,680) acres of land in Grizzly Valley; also the said timber on about One Thousand and Eighty (1,080) acres in Squaw Valley, and the said timber on about Seven Hundred and Sixty (760) acres in Last Chance Valley, or a total of about Five Thousand Five Hundred and Twenty (5,520) acres, said right and option to purchase to continue until July 1, 1920;

Provided, however, that payments shall be made by said second party, or assigns, to said first party for said timber, as follows, viz.: The sum of Twenty-five Thousand Dollars ($25,000) shall be paid to first party at Susanville, California, on or before July 1, 1920; also a further sum of Twenty-five Thousand Dollars ($25,000) shall be paid on or before November 1, 1920; also a further sum of Fifty Thousand Dollars shall be paid on or before July 1, 1921; and a final payment shall be made on or before July 1, 1922, in the sum of Fifty Thousand Dollars ($50,000) provided further that all [41] deferred payments due or to become due after July 1st, 1920, shall bear interest at the rate of four (4) per cent per annum from July 1st, 1920, until paid, said interest being payable annually;

It is mutually agreed that in the event that the purchaser, party of the second part, shall fail to make any of the deferred payments promptly when they become due, then the party of the first part shall be relieved from any and all obligation to

sell said timber, and he may retain any moneys that have been theretofore paid by second party as liquidated damages for the breach of this contract.

It is further understood and agreed that the party of the first part has heretofore caused the mature timber on the lands herein referred to be cruised by one F. B. Cayot, and estimated at approximately 59,866,210 feet, board measure, which cruise marked Exhibit 'A' attested by the signature of the party of the first part, is hereby referred to and made a part of this agreement;

It is further mutually agreed by the parties hereto, that second party shall be allowed until November 1, 1920, in which to verify and accept said cruise, and in case the cruise as set forth in said Exhibit 'A' hereto shall not be acceptable to second party, then and in that event, the first party hereto shall select one cruiser and the second party shall select one cruiser and these two shall select a third cruiser, and the three cruisers shall constitute a board of arbitration to examine into and adjust the difference, if any, between the cruise as shown by Exhibit 'A' and the cruise of the party of the second part, and the findings of the said three cruisers so appointed shall be final and shall be accepted by both parties to this agreement, and their figures of the total feet board measure of mature timber on said lands shall be [42] and become the figures to be used as the basis of this agreement.

It is agreed by both parties hereto that if the purchaser, the second party, or his assigns, shall

desire to cut any of said timber before the full purchase price is paid, he or his assigns, shall select and designate the particular forty (40) acre tract or tracts which it is desired to commence cutting upon, and shall pay in advance to said first party an amount equal to Two Dollars and fifty cents (2.50) per thousand feet stumpage, as per the cruise in Exhibit 'A' or any amendment thereof, for the forty (40) acre tract or tracts so selected and designated; said payment to be in addition to the first payment of Twenty-five Thousand Dollars ($25,000) but such payments for stumpage shall be applied upon any deferred payment or payments not then due and payable.

It is further agreed that any time after the said first payment shall have been made, the said second party shall be privileged to enter upon said timber lands or any lands adjacent thereto owned by said party of the first part in said Plumas County, and erect such mill or mills, road or roads or other means of transporting logs, lumber, supplies, etc., or other apparatus for manufacturing lumber and timbers as shall be necessary to enable said party of the second part to manufacture said timber into commercial form.

There is also hereby granted a right of ingress and egress to and over any of said lands that may be necessary to construct said mill and equipment and to market said lumber and for general uses in connection with milling operations on said lands; provided, however, that if it becomes necessary to construct or repair roads for said purposes, then

the said party of the second part agrees to construct and keep in repair the said roads at his own cost and with as little damage [43] as possible to the land through which they shall be constructed.

It is further understood and agreed that in conducting milling, merchandising and all other operations in connection therewith on said lands by the said party of the second part, that the same shall be done with as little damage or injury to said lands and with as little interference with the use of the remainder of said lands owned by said first party for any such purpose or purposes as he shall at any time during the continuance hereof elect to use said lands for.

It is further agreed that in the use of said lands by said party of the second part, he shall at all times conduct all operations subject to the requirements of the Federal, State and County laws and ordinances and will pay all licenses or any other payments required to be paid for and on account of said milling or other operations carried on by the said second party to the Federal, State or County government.

It is further agreed that in conducting said milling and other operations, including logging operations, the said party of the second part shall and will at all times do so with as little damage to the growing and unmerchantable timber on said lands as may be, and will suitably and properly and lawfully control and care for all sawdust, brush and other refuse resulting from said logging and milling operations and at usual and proper times make dis-

position thereof as may be required by law or shall be essential to prevent forest and other fires.

It is further agreed that the said party of the second part shall have, and there is hereby granted to him, a period of ten years from and after the first day of July, 1920, within which to cut and remove from said lands the timber hereby agreed to be sold.

It is further agreed that in the construction of any [44] roads or logging ways on any portion of said lands during the continuance hereof the said party of the second part shall not interfere with or obstruct the natural or other flow of such stream, or streams, as shall be intersected in the construction of said roads or logging ways, and the said party of the second part shall at his own cost and expense construct the culverts and bridges necessary to keep such waterways flowing in the way they have flowed theretofore or are then flowing.

It is further agreed that this agreement shall in no wise be construed as a lease of the said lands upon which timber hereinabove described shall be standing and growing, and the party of the second part shall have no right to use said lands for any purpose other than logging and milling and marketing said timber and shall, under no circumstances, be permitted to graze any stock whatsoever upon said lands or any portion thereof, and it is further agreed that the party of the second part using said lands for the purposes hereinabove set forth will keep all gates closed now or hereafter

placed upon said lands by the party of the first part.

Said party of the second part further agrees that at the expiration of said period of ten years, or on prior termination for any cause, he shall and will surrender to said party of the first part, his agent or attorney, peaceable and quietly the said lands and the whole thereof in as good order and condition, reasonable use thereof and damage by the elements excepted, as the same now are or may be hereafter put into, and not to make or suffer any waste thereof, nor lease, nor under-let, nor permit any person or persons to occupy, use or improve the same or any part thereof, excepting with the approval in writing having been first given by the said party of the first part. [45]

This agreement shall run to and bond the heirs, successors and assigns of the parties hereto.

It is further agreed that said second party shall and will at all times keep posted in two or more conspicuous places on said lands, including one on said mill, notices signed by said first party in substance and to the effect that said first party is not and shall not be or become liable for or obligated to pay for any labor, materials, or supplies furnished to or used by said second party in making improvements or conducting any operations on said lands, as aforesaid.

It is further agreed that time is of the essence hereof and that failure on the part of the said party of the second part to make payment of Twenty-five Thousand Dollars ($25,000) on the first

day of July, 1920, shall be and constitute a breach hereof, and that then, or thereafter, said party of the first part may, at his option, thereafter declare this agreement forfeited and all rights thereunder terminated and ended.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first above written.

R. T. JENKINS,
First Party.
W. E. SEEHORN,
Second Party.

Witnesses:
A. A. BURKE.
MATTIE E. BURKE." [46]

It was stipulated between counsels for plaintiff and defendant that the contract, Exhibit 1, was assigned to the bankrupt corporation by W. E. Seehorn, which assignment was made within a short time—a month or more—after the date of the contract, and that Rees T. Jenkins consented thereto.

It was further stipulated that the sum of $10,000 in cash was paid under the terms of the contract, Exhibit 1, and the further sum of $15,000 in the capital stock of the bankrupt corporation representing 15,000 shares, for the first payment in full.

Counsel for plaintiff next offered in evidence an option, dated the 10th day of April, 1922, between Rees T. Jenkins, the defendant, and B. C. Soule of the County of Alameda, State of California, relating to the sawmill and this timber.

This document was admitted and marked Plaintiff's Exhibit 2, and is as follows:

PLAINTIFF'S EXHIBIT No. 2.

"THIS MEMORANDUM of Agreement made and entered into this 10th day of April, 1922, between Rees T. Jenkins of the County of Washoe, State of Nevada, party of the first part and B. C. Soule of the County of Alameda, State of California, party of the second part:

WITNESSETH:

The party of the first part hereby grants to the party of the second part the right to purchase on or before the 20th day of April, 1922, that certain sawmill, known as the McCollum-Christy Lumber Co. Mill, in Grizzly Valley, County of Plumas, State of California, with all milling and logging equipment pertaining thereto for the sum of $50,000.00 cash on the exercising of this option.

SECOND: And all timber remaining uncut by the terms of that certain written agreement executed June 19th, 1920, from the party of the first part hereto to the McCollum-Christy [47] Lumber Company, the party of the second part to pay to the party of the first part on the exercising of this option, $25,000 cash as payment on the said timber and the sum of $25,000 each year thereafter until all of the said timber is paid for at $2.50 per thousand for all species as per Exhibit 'A' of said agreement and a copy of which said Exhibit 'A' shall be attached to any new agreement between the parties hereto.

Party of the second part shall have one year from the exercising of this option to recheck or recruise the above timber. In the event of such recruise each party hereto may select a cruiser and said two cruisers may select a third and the estimates of a majority of said cruisers shall be final.

THIRD: Said yearly payments of $25,000.00 shall commence one year from the exercising of this option, all deferred payments to bear interest at 6% per annum from the day of agreement accepting this option until paid.

In case party of the second part desires to cut or remove more timber any season than payments cover then the next following payment of $25,000.00 must be made.

Party of the second part may make a full payment at any time.

FOURTH: Party of the second part shall have ten years to remove timber. In the event the timber is not removed in that time the party of the second part, to pay the taxes on all timber and 10¢ per thousand for the timber per year until the timber is removed.

FIFTH: Party of the second part may have the privilege to move said mill on to the other lands of said party of the first part, but not otherwise, and to erect one or more other mills for the manufacture of timber herein mentioned and is to have the privilege of manufacturing any adjoining timber in said mill [48] or mills.

SIXTH: Party of the second part to have the rights of way for logging and marketing of said timber and may use such small timber as he may need for milling and logging purposes.

All taxes on the land described in said agreement to be paid by the party of the first part except that party of the second part shall pay all taxes levied upon said lands by reason of their timber value. In all other respects said agreement hereinafter to be written shall be the same in substance as said agreement of June 19th, 1920.

The agreement in pursuance hereof to be made to apply to and bind the heirs and assigns and successors to the parties of such agreement and time is hereby especially made of the essence of this agreement.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first, above written.

REES T. JENKINS. (Seal)
B. C. SOULE. (Seal)"

Counsel for plaintiff next offered in evidence a bill of sale from the defendant Rees T. Jenkins to B. C. Soule, the party mentioned in Exhibit 2. This bill of sale was dated the 23d day of June, 1922, and acknowledged the same day and was admitted in evidence and marked Exhibit 3 and is as follows: [49]

PLAINTIFF'S EXHIBIT No. 3.

"KNOW ALL MEN BY THESE PRESENTS: That I, Rees T. Jenkins, of the County of Washoe,

State of Nevada, for and in consideration of the sum of Fifty Thousand Dollars ($50,000.00) to me in hand paid by B. C. Soule of the County of Alameda, State of California, receipt whereof is hereby duly acknowledged, does by these presents sell, assign, transfer and deliver to the said B. C. Soule, the following described property, situated in the County of Plumas, State of California, to wit:

1 certain sawmill, engine and boiler heretofore known and described as the McCollum-Christy Lumber Company Mill in Grizzly Valley in said County and State, together with—

All personal property, appliances, and kitchen furniture in the bunk houses on said premises now owned by the said Rees T. Jenkins.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 23d day of June, 1922.

REES T. JENKINS. (Seal)

State of Nevada,
County of Washoe,—ss.

On this 23d day of June, 1922, before me, N. J. Barry, a Notary Public, in and for the State and County aforesaid, personally appeared Rees T. Jenkins, personally known to me to be the same person whose name is subscribed to and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal at my office in the County of Washoe, State of Nevada, the day and year in this certificate first above written.

[Seal] N. J. BARRY,

Notary Public in and for the County of Washoe, State of Nevada.

My commission expires June 8th, 1923." [50]

Counsel for plaintiff then offered in evidence a judgment-roll in the Superior Court of the County of Plumas, State of California, wherein Rees T. Jenkins was plaintiff and W. E. Seehorn and McCollum-Christy Lumber Company were defendants. The judgment-roll was admitted and marked Plaintiff's Exhibit 4, and is as follows:

PLAINTIFF'S EXHIBIT No. 4.

"In the Superior Court of the County of Plumas, State of California.

REES T. JENKINS,

Plaintiff,

vs.

W. E. SEEHORN and McCULLUM-CHRISTY LUMBER COMPANY, a Corporation,

Defendant.

In this action the defendants, W. E. Seehorn and McCullum-Christy Lumber Company, a corporation, having been regularly served with process, as appears of record, and having failed to appear and answer the complaint on file herein; and the

time allowed by law for answering having expired, the default of said defendants in the premises is hereby duly entered according to law.

ATTEST, my hand and the seal of said Court this 6th day of May, 1922.

F. R. YOUNG,
Clerk.

By ————————————,
Deputy Clerk.

In the Superior Court of the State of California, in and for the County of Plumas. [51]

REES T. JENKINS,
Plaintiff,

vs.

W. E. SEEHORN, and McCULLUM-CHRISTY LUMBER CO., a Corporation,
Defendants.

AMENDED COMPLAINT.

Now comes the plaintiff above named and before the service of Summons or Appearance or Demurrer or Answer, filed, files this, his Amended Complaint, and for cause of action alleges:

I.

That on the 19th day of May, 1920, the plaintiff herein was the owner in possession and entitled to the possession of about 3,680 acres of land in Grizzly Valley; about 1,080 acres of land in Squaw Valley and about 760 acres of land in Last Chance Valley, all in the County of Plumas, State of Cali-

fornia, and that standing and growing upon said lands there was then and there a large amount of merchantable milling, pine, cedar and fir timber.

II.

That on the said 19th day of May, 1920, plaintiff, Rees T. Jenkins, and defendant, W. E. Seehorn, made and entered into a certain agreement in writing; by the terms of which said agreement said plaintiff, Rees T. Jenkins, agreed to sell to said W. E. Seehorn, all merchantable milling timber then standing and growing upon said lands.

Said agreement in terms further provided that there should be paid to said plaintiff on or before the first day of July, 1920, by the said defendant, W. E. Seehorn, the sum of $25,000; and that there should be paid to the plaintiff, by [52] the defendant, W. E. Seehorn, on or before the first day of November, 1920, the sum of $25,000; and that there should be paid to the plaintiff by the said defendant, W. E. Seehorn, on or before the first day of July, 1921, the sum of $50,000.

That said agreement in further terms provided that time was of the essence of said agreement and that a failure on the part of said W. E. Seehorn to make payments of the sums hereinbefore set forth at the time and in the manner hereinabove and in said agreement provided should be and constitute a breach of said agreement and that then and thereafter said plaintiff might at his option declare said agreement forfeited and all rights thereunder terminated and ended.

III.

That said agreement in terms provided that the same should apply to and bind the heirs, administrators, successors, and assigns of the parties thereto; and that after the making of said agreement the same was by the said W. E. Seehorn sold and assigned, transferred and delivered to the defendant, McCullum-Christy Lumber Company and said company is now the successor in interest of said W. E. Seehorn.

IV.

That said defendants and each of them have failed to pay to said plaintiff, said sum of $25,000, or any part thereof, except the sum of $10,000, on or before the first day of July, 1920; and that they have failed to pay to the said plaintiff the sum of $25,000, or any part thereof, on or before the first day of November, 1920; and have failed to pay to said plaintiff said sum of $50,000, or any part thereof, on or before the first day of July, 1921; and said defendants and each of them still continue to fail to pay to said plaintiff said sums hereinabove set forth at the times and in the manner hereinabove set forth, except the sum of $10,000, hereinabove [53] set forth; and that the defendants have cut timber upon said lands of the value of $12,500 in excess of any sums paid to said plaintiff by the said defendants or either of them.

V.

That prior to the commencement of this action the plaintiff demanded of defendants and each of them that they pay to him all sums of money due

and owing under the terms of said agreement but that defendants and each of them failed and refused and do still fail and refuse to pay to the plaintiff the sums due and owing under the terms of said agreement except the sum of $10,000 as hereinabove alleged and that prior to the commencing of this action the plaintiff gave notice to the said defendants and each of them that he exercised his option to declare said agreement forfeited and all rights thereunder terminated and ended.

VI.

That the defendants have erected upon said land one certain sawmill and have placed in said sawmill a certain engine and boiler; that said sawmill and said engine and boiler have become and are fixtures upon said land in that said sawmill is permanently resting upon said lands; the said engine is permanently attached to timbers by nails, bolts and screws and the timber upon which said engine is resting is permanently resting upon said lands and said boiler is permanently attached to said lands by cement and plaster and is encased in a brick and stone wall and which said wall is embedded in said lands.

That said sawmill, engine and boiler were erected and placed upon and attached to said lands without any agreement by the defendants or either of them for the removal thereof.

VII.

That the defendant, McCullum-Christy Lumber Co., is [54] now and at all of the times herein

mentioned it was a corporation organized and existing under the laws of the State of Oregon.

WHEREFORE, plaintiff prays judgment for a decree of this court declaring said agreement forfeited and all rights thereunder terminated and ended, and further declaring that said sawmill and engine and boiler are a part of said lands and are the property of the plaintiff and that the sum of $10,000 paid to the plaintiff by the defendants has become forfeited to the plaintiff; for costs of suit; and for such other and further relief as the court may see meet and proper in the premises.

DODGE & BARRY,
Attorneys for the Plaintiff.

State of Nevada,
County of Washoe,—ss.

N. J. Barry, being first duly sworn, deposes and says: That he is attorney for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true to his own knowledge, except as to those matters which is therein stated upon his information and belief, and as to those matters that he believes it to be true.

Affiant further says that this verification is made by affiant instead of the plaintiff for the reason that said plaintiff is absent from said county where the affiant resides.

N. J. BARRY.

Subscribed and sworn to before me this 11th day of April, 1922.

[Seal] A. R. SHEWALTER,

Notary Public in and for the County of Washoe, State of Nevada. [55]

In the Superior Court of the State of California, in and for the County of Plumas.

REES T. JENKINS,

Plaintiff,

vs.

W. E. SEEHORN and McCULLUM-CHRISTY LUMBER CO., a Corporation,

Defendants.

AFFIDAVIT OF SERVICE.

State of California,
County of Plumas,—ss.

E. M. Neese, being first duly sworn, deposes and says that he is now and at all of the times herein mentioned was a male citizen of the United States over the age of 21 years, and not a party to or interested in the above-entitled action.

Affiant further says that he served the within and foregoing summons on the defendants therein named, to wit: W. E. Seehorn and McCullum-Christy Lumber Company, a corporation, at and in the County of Plumas, State of California on the 13th day of April, 1922, by delivering to and leaving with the said defendant W. E. Seehorn, personally at said time and place a true copy of

said summons together with a true copy of the plaintiff's amended complaint in said cause; and by delivering to and leaving with the said W. E. Seehorn as the managing agent of the said McCullum-Christy Lumber Company, within the State of California, at said time and place a true copy of said summons together with a true copy of the plaintiff's amended complaint on file in said action.

Affiant further says that he knows the said W. E. Seehorn to be the same person named as defendant in the said action [56] and knows the said W. E. Seehorn to be the Managing Agent within the State of California, of the said McCullum-Christy Lumber Company.

E. M. NEESE.

Subscribed and sworn to before me this 13th day of April, 1922.

[Seal] M. F. LOOSLEY,

Notary Public in and for the County of Plumas, State of California.

My commission expires May 13th, 1922.

In the Superior Court of the County of Plumas, State of California.

REES T. JENKINS,

Plaintiff,

vs.

W. E. SEEHORN and McCULLUM-CHRISTY LUMBER CO., a Corporation,

Defendants.

Action brought in the Superior Court of the County of Plumas, State of California, and the complaint filed in the Office of the Clerk of said County of ——.

DODGE and BARRY,
Attorneys for Plaintiff.

The People of the State of California Send Greeting To: W. E. Seehorn and McCullum-Christy Lumber Co., a Corporation, Defendants:

You are hereby directed to appear, and answer the complaint in an action entitled as above, brought against you in the Superior Court of the County of Plumas, State of California, within ten days after the service on you of this summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said plaintiff will take judgment [57] for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the court for any other relief demanded in the complaint.

Given under my hand and the seal of the Superior Court of the County of Plumas, State of California, this third day of April, 1922.

[Seal] F. R. YOUNG,
Clerk.

In the Superior Court of the State of California, in and for the County of Plumas.

REES T. JENKINS,

Plaintiff,

vs.

W. E. SEEHORN and McCULLUM-CHRISTY LUMBER COMPANY, a Corporation,

Defendants.

FINDINGS.

This cause came on regularly for trial on the 6th day of May, 1922, before the Court without a jury; N. J. Barry, appeared as attorney for the plaintiff, and the defendants failed to appear either in person or by attorney; and it appearing to the Court that the summons in this action was duly and regularly, personally served on the defendants in the County of Plumas, State of California, on the 13th day of April, 1922; and that the legal time for answering, appearing or pleading had expired and that the defendants and each of them failed to appear, plead or answer, within the time allowed by law; and that the defaults of said defendants and each of them was duly taken and entered in this cause; and from the evidence introduced the Court finds the facts as follows, to wit: [58]

I.

That on the 19th day of May, 1920, the plaintiff herein was the owner in possession and entitled to the possession of about 3,680 acres of land in

Grizzly Valley; about 1,080 acres of land in Squaw Valley and about 760 acres of land in Last Chance Valley, all in the County of Plumas, State of California; and that standing and growing upon said lands there was then and there a large amount of merchantable milling, pine, cedar, and fir timber.

II.

That on the said 19th day of May, 1920, plaintiff, Rees T. Jenkins, and defendant, W. E. Seehorn, made and entered into a certain agreement in writing; by the terms of which said agreement said plaintiff, Rees T. Jenkins, agreed to sell to said W. E. Seehorn, all merchantable milling timber then standing and growing upon said lands.

Said agreement in terms further provided that there should be paid to said plaintiff on or before the first day of July, 1920, by the said defendant, W. E. Seehorn, the sum of $25,000; and that there should be paid to the plaintiff by the defendant, W. E. Seehorn, on or before the first day of November, 1920, the sum of $25,000; and that there should be paid to the plaintiff, by the said defendant, W. E. Seehorn, on or before the first day of July, 1921, the sum of $50,000.

That said agreement in further terms provided that time was of the essence of said agreement and that a failure on the part of said W. E. Seehorn to make payments of the sums hereinbefore set forth at the time and in the manner hereinabove and in said agreement provided should be and constitute a breach of said agreement and that then and thereafter said plaintiff might at his option declare said

agreement forfeited and all rights thereunder terminated and ended. [59]

III.

That said agreement in terms provided that the same should apply to and bind the heirs, administrators, successors, and assigns of the parties thereto; and that after the making of said agreement the same was by the said W. E. Seehorn sold and assigned, transferred and delivered to the dedefendant, McCullum-Christy Lumber Company and said company is now the successor in interest of said W. E. Seehorn.

IV.

That the said defendants and each of them have failed to pay to the said plaintiff, said sum of $25,000 or any part thereof, except the sum of $10,000, on or before the first day of July, 1920; and that they have failed to pay to the said plaintiff the sum of $25,000, or any part thereof, on or before the first day of November, 1920; and have failed to pay to said plaintiff said sum of $50,000, or any part thereof, on or before the first day of July, 1921; and said defendants and each of them still continue to fail to pay to said plaintiff said sums hereinabove set forth at the times and in the manner hereinabove set forth, except the sum of $10,000 hereinabove set forth; and that the defendants have cut timber upon said lands of the value of $2000 in excess of any sums paid to said plaintiff by the said defendants or either of them.

V.

That prior to the commencement of this action

the plaintiff demanded of defendants and each of them that they pay to him all sums of money due and owing under the terms of said agreement but that defendants and each of them failed and refused and do still fail and refuse to pay to the plaintiff the sums due and owing under the terms of said agreement except the sum of $10,000 as hereinabove alleged and that prior to the commencing of this action the plaintiff gave notice to the said defendants [60] and each of them that he exercised his option to declare said agreement forfeited and all rights thereunder terminated and ended.

VI.

That the defendants have erected upon said land one certain sawmill and have placed in said sawmill a certain engine and boiler; that said sawmill and said engine and boiler have become and are fixtures upon said land in that said sawmill is permanently resting upon said lands; the said engine is permanently attached to timbers by nails, bolts and screws and the timber upon which said engine is resting is permanently resting upon said lands and said boiler is permanently attached to said lands by cement and plaster and is encased in a brick and stone wall and which said wall is embedded in said lands.

That said sawmill, engine and boiler were erected and placed upon and attached to said lands without any agreement by the defendants or either of them for the removal thereof.

VII.

That the defendant, McCullum-Christy Lumber

Co., is now and at all of the times herein mentioned it was a corporation organized and existing under the laws of the State of Oregon.

As a conclusion of law from the foregoing facts the Court finds that the plaintiff is entitled to a judgment in this cause; declaring said agreement forfeited and all rights therein terminated and ended; and further declaring that said sawmill, engine and boiler are a part of said lands, and are the property of the plaintiff; and that the sum of $10,000 paid to the plaintiff by the defendant, has become forfeited to the plaintiff; and that the plaintiff do have and recover from the defendants, his costs herein expended; and it is ordered that judgment be entered herein in accordance herewith. [61]

Dated May 6, 1922.

J. O. MONCUR.
Judge.

In the Superior Court of the State of California, in and for the County of Plumas.

REES T. JENKINS,
Plaintiff,

vs.

W. E. SEEHORN and McCULLUM-CHRISTY LUMBER COMPANY, a Corporation,
Defendants.

JUDGMENT.

In this action the defendants, W. E. Seehorn, and McCallum-Christy Lumber Company, a corpora-

tion, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint filed herein, and the legal time for answering having expired, and no answer or demurrer having been filed, and the default of said defendants, W. E. Seehorn, and McCullum-Christy Lumber Company, in the premises having been duly entered according to law; and the plaintiff having introduced evidence both oral and documentary, and the evidence being closed the cause was submitted to the Court for consideration and decision; and after due deliberation thereon the Court filed its findings and decision in writing, and ordered that judgment be entered herein in favor of the plaintiff in accordance therewith.

WHEREFORE, by reason of the law and the finding aforesaid, it is ORDERED, ADJUDGED and DECREED, and this does ORDER, ADJUDGE, and DECREE that said agreement of date, the 19th day of May, 1920, between the plaintiff herein and the said [62] defendant, W. E. Seehorn, be and the same is hereby forfeited and all rights therein and thereunder are hereby terminated and ended; and that the sum of $10,000.00 heretofore paid by the said defendants has become forfeited to the plaintiff; and that the said sawmill, engine and boiler erected upon said land, by the defendants, are and have become a part of said lands and are the property of the said plaintiff; and it is further ordered that the plaintiff do have and recover of and from the defendants his costs herein expended, taxed at the sum of $——.

Done in open court this 6th day of May, 1922.

J. O. MONCUR.

Judge.

In the Superior Court of the County of Plumas, State of California.

REES T. JENKINS,

Plaintiff,

vs.

W. E. SEEHORN and McCULLUM-CHRISTY LUMBER CO., a Corporation,

Defendants.

I, F. R. Young, County Clerk of the County of Plumas, State of California, and *ex-officio* Clerk of the Superior Court of said County, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action, and recorded in Judgment Book of said Court, at page 259. And I further certify that the foregoing papers, hereto annexed, constitute the judgment-roll in said action.

WITNESS, my hand and the seal of said court, this [63] 6th day of May, 1922.

[Seal] F. R. YOUNG,

Clerk.

By ————————,

Deputy Clerk.

Office of the County Clerk
of the County of Plumas,—ss.

I, F. R. Young, County Clerk of the County of Plumas, in the State of California, and *ex-officio*

Clerk of the Superior Court of said Plumas County, and State aforesaid, hereby certify that I have compared the foregoing copy with the original judgment-roll in the above-entitled matter filed in my office on the 6th day of May, 1922, and that the same is a full, true and correct copy of such original and of the whole thereof.

WITNESS my hand and the seal of said Court this 11th day of August, A. D. 1924.

[Seal] F. R. YOUNG,
Clerk."

It was stipulated between the counsel for plaintiff and defendant that a certain document which was marked Plaintiff's Exhibit 5 for Identification and entitled "Examination of Rees T. Jenkins at first meeting of creditors held on the 10th day of March, 1923, before Richard Belcher, Referee in Bankruptcy, at Marysville, in said district," was a true and correct transcript and correctly transcribed.

TESTIMONY OF REES T. JENKINS, FOR PLAINTIFF.

REES T. JENKINS, the defendant, was called and sworn by the plaintiff under the provisions of Section 2055 of the Code of Civil Procedure of the State of California and testified as follows:

"I am the defendant in this action. My name is Rees T. Jenkins. I reside at Johnsonville, Lassen County, California. [64] I formerly resided at Reno, Nevada. I am the Rees T. Jenkins mentioned in Exhibit Number 1 as being the party

(Testimony of Rees T. Jenkins.)

of the first part and making a contract with a man by the name of W. E. Seehorn in 1920. I am the owner of the property covered by that contract, that is, the real estate, the land, and it is situated in Plumas County, California. Under that contract on May 19th, 1920, I received $10,000. I haven't anything to show the date."

Counsel for plaintiff here offered in evidence a contract between Rees T. Jenkins of Reno, Nevada, and the McCullum-Christy Lumber Company, which contract was admitted in evidence and marked Plaintiff's Exhibit 6, and is as follows:

PLAINTIFF'S EXHIBIT No. 6.

"THIS AGREEMENT, made and entered into this 19th day of June, A. D. 1920, by and between REES T. JENKINS, of Reno, Nevada, party of the first part, and the McCULLUM–CHRISTY LUMBER COMPANY, an Oregon corporation with its principal place of business at Klamath Falls, Oregon, party of the second part,

WITNESSETH:

That for and in consideration of the sum of One Dollar ($1.00) in hand paid by the party of the first part to the party of the second part, receipt whereof is hereby acknowledged, and for the further payments to be made as hereinafter specified, the party of the first part agrees to sell, and the party of the second part agrees to buy, for the sum of One Hundred and Fifty Thousand Dollars ($150,000.00) all of the standing merchantable mill-

ing timber on the lands owned by the said party of the first part, in Plumas County, California, described in Exhibit 'A' attached hereto, and situate, lying and being in the following localities, to wit:

The said timber on about three thousand six hundred and eighty (3680) acres of land in Grizzly Valley; also, the said timber on about one thousand and eighty (1080) acres in [65] Squaw Valley, and the said timber on about seven hundred and sixty (760) acres in Last Chance Valley, or a total of about five thousand five hundred and twenty (5520) acres, said right and option to purchase to continue until July 1, 1920;

Provided, however, that payments of said sum of One Hundred and Fifty Thousand Dollars ($150,000.00 shall be made by said second party, or assigns, to said first party for the said timber, as follows, viz.: The sum of Twenty-five Thousand Dollars ($25,000.00) thereof shall be paid to first party at Susanville, California, on or before July 1, 1920, of which Ten Thousand Dollars ($10,000.00) shall be paid in cash and Fifteen Thousand Dollars ($15,000.00) shall be paid in capital stock of second party at par; Also, a further sum of Twenty-five Thousand Dollars ($25,000.00) thereof, shall be paid on or before November 1, 1920; Also a further sum of Fifty Thousand Dollars, thereof, shall be paid on or before July 1, 1920; and a final payment shall be made on or before July 1, 1922, in the sum of Fifty Thousand Dollars ($50,000.00) thereof; provided further, that all deferred payments due

or to become due after July 1st, 1920, shall bear interest at the rate of four per cent per annum from July 1st, 1920 until paid; said interest being payable annually;

It is mutually agreed that in the event that the purchaser, party of the second part, shall fail to make any of the deferred payments promptly when they become due, then the party of the first part shall be relieved from any and all obligation to sell said timber, and he may retain any moneys that have been theretofore paid by second party as liquidated damages for the breach of this contract.

It is further understood and agreed that the party of the first part has heretofore caused the mature timber on the lands herein referred to to be cruised by one F. B. Cayot, [66] and estimated at approximately 59,866,210 feet, board measure, a copy of which cruise is attached hereto and marked Exhibit 'A' and is hereby referred to and made a part of this agreement;

It is further mutually agreed by the parties hereto, that second party shall be allowed until November 1, 1920, in which to verify and accept said cruise, and in case the cruise as set forth in said Exhibit 'A' hereto shall not be acceptable to second party, then in that event, the first party hereto shall select one cruiser and the second party shall select one cruiser and these two shall select a third cruiser, and the three cruisers shall constitute a board of arbitration to examine into and adjust the difference, if any, between the cruise as shown

by Exhibit 'A' and the cruise of the party of the second part; and the findings of the said three cruisers so appointed shall be final and shall be accepted by both parties to this agreement, and their figures of the total feet of board measure of mature timber on said lands shall be and become the figures to be used as the basis of this agreement, and the said purchase price shall be changed in proportion to any difference there shall be between their figures and the figures of said Exhibit 'A.'

It is agreed by both parties hereto that if the purchaser, the second party, or its assigns, shall desire to cut any of said timber before the full purchase price is paid, it or its assigns shall select and designate the particular forty (40) acre tract or tracts which it is desired to commence cutting upon, and shall pay in advance to said first party an amount equal to Two Dollars and Fifty Cents ($2.50) per thousand feet stumpage, as per the cruise in Exhibit 'A' or any amendment thereof, for the forty (40) acre tract or tracts so selected and designated; said payment to be in addition to the first payment of Twenty-five Thousand Dollars [67] (25,000.00) but such payments for stumpage shall be applied upon any deferred payment or payments not then due and payable.

It is further agreed that at any time after the said first payment shall have been made, the said second party shall be privileged to enter upon said timber lands or any lands adjacent thereto owned by said party of the first part in said Plumas

County, and erect such mill or mills, road or roads, or other means of transporting logs, lumber, supplies, etc., or other apparatus for manufacturing lumber and timbers as shall be necessary to enable said party of the second part to manufacture said timber into commercial form.

There is also hereby granted a right of ingress and egress to and over any of said lands that may be necessary to construct said mill and equipment and to market said lumber and for general uses in connection with milling operations on said lands; provided, however, that if it becomes necessary to construct or repair roads for said purposes, then the said party of the second part agrees to construct and keep in repair the said roads at its own cost and with as little damage as possible to the lands through which they shall be constructed.

It is further understood and agreed that in conducting milling, merchandising and all other operations in connection therewith on said lands by the said party of the second part, that the same shall be done with as little damage or injury to said lands and with as little interference with the use of the remainder of said lands owned by said first party for any such purpose or purposes as he shall at any time during the continuance hereof elect to use said lands for.

It is further agreed that in the use of said lands by said party of the second part, it shall at all times conduct all operations subject to the requirements of the Federal, State and County Laws and ordinances and will pay all licenses [68] or any

other payments to be paid for and on account of said milling or other operations carried on by the said second party to the Federal, State or County Government.

It is further agreed that in conducting said milling and other operations, including logging operations, the said party of the second part shall and will at all times do so with as little damage to the growing and unmerchantable timber on said lands as may be, and will suitably and properly and lawfully control and care for all sawdust, brush and other refuse resulting from said logging and milling operations and at usual and proper times make disposition thereof as may be required by law or shall be essential to prevent forest and other fires.

It is further agreed that the said party of the second part shall have, and there is hereby granted to it, a period of ten years from and after the first day of July, 1920, within which to cut and remove from said lands the timber hereby agreed to be sold.

It is further agreed that in the construction of any roads or logging ways on any portion of said lands during the continuance hereof, the said party of the second part shall not interfere with or obstruct the natural or other flow of such stream, or streams, as shall be intersected in the construction of said roads or logging ways, and the said party of the second part shall at its own cost and expense construct the culverts and bridges necessary to keep such waterways flowing in the

way they have flowed theretofore or are then flowing.

It is further agreed that this agreement shall in no wise be construed as a lease of the said lands upon which timber hereinabove described shall be standing and growing, and the party of the second part shall have no right to use said lands for any purpose other than logging and milling and [69] *and* marketing said timber and shall, under no circumstances, be permitted to graze any stock whatsoever upon said lands or any portion thereof; and it is further agreed that the party of the second part using said lands for the purposes hereinabove set forth will keep all gates closed now or hereafter placed upon said lands by the party of the first part.

Said party of the second part further agrees that at the expiration of said period of ten years, or on prior termination for any cause, it shall and will surrender to said party of the first part, his agent or attorney, peaceable and quietly the said lands and the whole thereof in as good order and condition, reasonable use thereof and damage by the elements excepted, as the same now are or may be hereafter put into, and not to make or suffer any waste thereof, nor lease, nor underlet, nor permit any person or persons to occupy, use or improve the same or any part thereof, excepting with the approval in writing having been first given by the said party of the first part.

This agreement shall run to and bind the heirs, successors and assigns of the parties hereto.

It is further agreed that said second party shall and will at all times keep posted in two or more conspicuous places on said lands, including one on said mill, notices signed by said first party in substance and to the effect that said first party is not and shall not be or become liable for or obligated to pay for any labor, materials, or supplies furnished to or used by said second party in making improvements or conducting any operations on said lands, as aforesaid.

It is further agreed that time is of the essence hereof and that failure on the part of the said party of the second part to make payment of Twenty-five Thousand Dollars [70] ($25,000.00) on the first day of July, 1920, shall be and constitute a breach hereof, and then *then*, or thereafter, said party of the first part, may, at his option, thereafter, declare this agreement forfeited and all rights thereunder terminated and ended.

It is mutually understood and agreed that the party of the first part will execute a timber warranty deed to the party of the second part, and place the same in the Bank of Lassen County, Susanville, with one copy of this agreement, and upon completion of this contract and final payment as specified herein the said Bank of Lassen County, will deliver to the party of the second part the said timber deed.

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal, and the party of the second part has caused this instrument to be duly executed by its vice-president,

(Testimony of Rees T. Jenkins.)

thereunto duly authorized the day and year first above written.

REES T. JENKINS, (Seal)
Party First Part.

McCULLUM-CHRISTY LUMBER COMPANY,
Party of the Second Part.
By W. E. SEEHORN,
Vice-president.

Witnesses:
C. H. BRIDGES."

It was stipulated that this contract took place of an assignment of the contract admitted as Exhibit 1.

WITNESS.—(Continuing.) This contract, Exhibit 6, superseded the contract between myself and Seehorn. It was under this contract that I received the $10,000 in cash. Between the dates of these [71] two contracts I suppose there had been a corporation organized in Oregon, known as the McCollum-Christy Lumber Company. I had not become president of it at that time. I really could not tell you when I first became president.

Question.—"About when did you become president?"

Mr. BARRY.—"We object to that, the record is the best evidence. They have the record."

Mr. PRESTON.—"I haven't any record."

Question.—"Don't you know about when it was?"

(Testimony of Rees T. Jenkins.)

The COURT.—"He is asking for his recollection merely. No doubt it can be proved."

Answer.—"I could not tell you as to the date."

WITNESS.—(Continuing.) I do not know if the corporation had any president other than myself. I do not know whether or not I was president. I do not know if my name was carried on the minutes of the corporation as president. I was not represented to be the president of the company. I never did any act that was done as president of the company. I could not tell you who was the president of the company. Mr. Seehorn was the man I dealt with. I paid no attention as to what was going on as to the management of the company at all. I owned 15,000 shares at a dollar a share. I have never seen my certificate of stock and I haven't got it. If it was issued it was left some place. It never came to my hands. I never saw it at all. I don't know whose name is signed to it as president. [72] I had no interest in the company except the 15,000 shares. To the best of my recollection I never endorsed any papers to the company. Mr. Seehorn never asked me to allow my name to be used as president of the company. I refused Mr. Seehorn to use my name there at all for a long time, and finally he told me that I had better let my name go in just as a form, but I was not to take any action at all in the management of the company. I gave testimony in March, 1923, before the Referee in Bankruptcy at Marysville, I testified I was president of the company. I was not the acting president.

(Testimony of Rees T. Jenkins.)

The following questions and answers were read to the witness from Plaintiff's Exhibit 5 for Identification:

"Q. You were president of the company?

A. Yes.

Q. You were president of the company at the time of its inception, were you not?

A. I was not the acting president.

Q. I am not asking you about 'acting.' You were the president of the company at the time of the inception of the company's existence?

A. Yes."

And the witness being asked if he gave those answers to those questions replied:

"Yes, the record ought to show."

The counsel for plaintiff read to the witness the following questions and answers from Plaintiff's Exhibit 5 for identification:

"Q. You were one of the people that incorporated the company?

A. I had nothing to do with the incorporating of it.

Q. You were one of the incorporators?

A. I will tell you what I had in it.

Q. All right.

A. When Mr. W. E. Seehorn incorporated the company he asked me if they could use my name as president [73] of the company, and I asked him why he wanted to use my name; well, he says, 'On account of your acquaintance here, and that we might be able to do business with the banks in

(Testimony of Rees T. Jenkins.)

Reno.' I says, 'I am taking no active part in the company at all, if it does any good to use my name it is all right with me.'

Q. With that understanding you became president of the company? A. Yes.

Q. Did you give those answers to those questions.

A. Well, as I tell you, I don't remember. The record will show. If I signed my name to it I must have done it. Well, according to that paper I must have, but I have no recollection of it."

I think I must have made the answers shown in the record if it is down in the record and that's all I have to say and the only memory I have of it. Those questions may have been put to me. I cannot say. I was asked whether I was the president of the company. If it is on the paper I must have said yes. I don't remember much about what went on that day. I never attended a stockholders' meeting to my recollection. I don't recollect if I was present at a meeting of stockholders in Klamath Falls, Oregon, in the fall of 1921. I went with Mr. Seehorn down to Paraiso Springs but I did not know who were the directors of the company. When I gave this contract to the lumber company the corporation built a mill on my property. I don't know what equipment comes with a logging outfit and I don't know what they had.

The defendant then admitted having been on the premises three or four times after the mill was erected and before he sold it to Soule.

(Testimony of Rees T. Jenkins.)

I saw the mill there. I had no idea what it cost. I had no idea what it was worth at the time it was first erected. I had no idea what it was worth when I sold it to Soule. I asked $50,000 for it. It was probably myself who fixed the price. [74] I think I did. I did not have any data at all. I just simply asked that much. I don't know why I didn't ask a hundred thousand. I was satisfied if Mr. Soule would give me that money. At the time I sold that property certain back payments were due on the contract. I could not tell you how much without having the papers to go by. I sold the mill and equipment in connection with it for $50,000. Then I sold the timber contract, or made a new contract on substantially, if not exactly, the same terms that I had the other contract on and Mr. Soule paid me $25,000 on account of that contract. I got $75,000 from Soule, from the mill and on the timber. I never got another $25,000. $75,000 was all I ever got. At that time I could not tell you how much timber had been cut from my land. I could not tell you that, no one gave me an inventory or statement in writing showing how much had been cut. No, sir, I made no inquiries from the operators of the mill. I don't know whether it was all cut, or half cut, or whether 1,000 feet were cut. I can't tell you when the suit was started in Plumas County. My attorney, Mr. Barry, could tell you that. I could not tell you as to the date, of the judgment. I was in court before Judge Moncur and testified as a witness.

(Testimony of Rees T. Jenkins.)

So far as I know the suit was commenced on the 3d of April, and the judgment entered on the 6th of May following. I claimed the property before the date of judgment. I claimed it was my property until I got paid for it. I never paid anything for the mill or the machinery or the personal property. The company owed me. They owed me on the contract and interest on the money—nothing else. As to notice of forfeiture Mr. Barry attended to that. I could not tell you how that was done. I don't remember of signing any writing.

It was then admitted between counsels for plaintiff and defendant that the following written notice was served on [75] W. E. Seehorn on the 23d day of March, 1922. It was admitted this document was signed by N. J. Barry, attorney for Rees. T. Jenkins. This was admitted and marked Plaintiff's Exhibit 7 and is as follows:

PLAINTIFF'S EXHIBIT No. 7.

"Reno, Nevada, March 23, 1922.

To W. E. Seehorn and McCollum-Christy Lumber Company:

You and each of you are hereby notified that Rees T. Jenkins hereby elects to declare that certain agreement of date May 19, 1920, made and entered into between Rees T. Jenkins and W. E. Seehorn and by said W. E. Seehorn assigned to McCollum-Christy Lumber Company, which said agreement was for the sale of certain timber on the lands in Grizzly Valley, Squaw Valley and Last Chance

(Testimony of Rees T. Jenkins.)

Valley, in the County of Plumas, State of California, as hereby forfeited and declared terminated for the failure to perform the terms of said agreement within the time in said agreement specified, and for failure to make the payments of the sums specified in said agreement at the times and in the manner in said agreement specified.

And you are further notified that the said Rees T. Jenkins intends to immediately commence an action in the Superior Court of the County of Plumas, State of California, to declare said agreement forfeited and of no effect.

_____,

Attorney for Rees T. Jenkins."

The WITNESS.—(Continuing.) I never told anyone, other than what is stated in this paper, that I claimed the mill. When I testified in court I told the Court I had taken 15,000 shares of stock. I told the Court that I had been paid but $10,000 in any form.

"Q. I am referring to the court at Quincy, Plumas County. Didn't you tell the Court then, when you were before Judge Moncur that you had only been paid $10,000.00?

A. I told the [76] Court exactly how the thing stood at the time. I don't remember how that was. I must have told him that the first payment had been made, $10,000.00 in cash and $15,000 in stock. I must have told him that; if it was asked me I must have told him. I don't remember personally

(Testimony of Rees T. Jenkins.)

telling that. I could not say as I don't remember exactly.

Q. Don't you know that you told the Court that the lumber company, the corporation here, the bankrupt, had owed you the sum of $25,000.00, and that no part of it was paid except the sum of $10,000.00, and didn't you so state in your testimony at that time?

A. I stated that the payments followed probably there was more than one payment due. I didn't tell the Court as to the first payment that it had not been made.

Q. Did you see any findings or judgment of the Court which read like this: 'And said defendants and each of them still continue to fail to pay to said plaintiff the said sums hereinabove set forth at the times and in the manner hereinabove set forth, except the sum of $10,000 hereinabove set forth.' Didn't you know that the Court decided in that case that only $10,000 had been paid to you?

A. It was made known to the Court that I had $15,000 in stock and I don't know how it was entered into the judgment that I had only been paid $10,000."

I discussed the suit, after I brought it, with Mr. Seehorn. I could not recall just what it was. It is quite a while ago. I told Mr. Seehorn that I would have to take proceedings to protect myself. I could not say whether I told him that I was going to start the suit or that I had started it. The papers were served on him through my attorney. As far

(Testimony of Rees T. Jenkins.)

as I know he was the vice-president and general manager at that time. I could not tell if Mr. Christy was vice-president. I knew he was a director. I don't think I had Mr. Christy employed at the time this option was signed with Soule. [77] Mr. Christy found Mr. Soule for me as a purchaser. I don't remember that there was anything done with Christy until the thing came from the court at Quincy. I agreed with Christy to pay him a commission but as to the time I don't remember. It was $5,000. I don't remember at the time that I had fixed a price at $50,000. Yes, I hired Christy, who was vice-president of the company, to find a buyer. That's true. I cannot say as to the date. I don't know whether there was any option given to Christy or not. I never knew Soule. Christy was the man. I never knew Soule until Christy brought him to me. I must have seen Christy before I gave Soule the option, before I went through the court with this case, according to the paper you have. I had agreed to give Christy $5,000 to hunt for a purchaser for the mill and property. I knew that Christy was a member of the Board of Directors and that his name was in the title of this company.

"When I sold this mill in the month of April, 1922, and employed the vice-president of the company to hunt a purchaser for me, I presumed it was mine."

I knew of no debts of the company except what they owed me. I did not know that there were

(Testimony of Rees T. Jenkins.)

other creditors. Mr. Seehorn did not tell me there were other debts. I never saw the books of the general merchandise stores in the little town of Beckwith. I don't remember whether or not I was told that Mr. Loosely was a creditor of that concern. I never was told and I never knew that Mr. Loosley made a trip to my attorney's office to find out what was going to be done about paying the debts of the company. I did not know that the Humphreys had a meat bill against them. Seehorn might have told me but I don't remember. When I put the suit through the Plumas County court I did not think there were any creditors. I could not say how much the company owed. I had never been told what its indebtedness was. Seehorn never [78] told me that the company owed about $40,000. I had not been in a conference with Mr. Seehorn and Mr. Reilly at Paraiso Springs in which the liabilities of this company were discussed. There was no talk in my presence about the debts of that company. I was in the city of San Francisco and I met Seehorn there. Mr. Reilly had invited me down to see his place of business. Mr. Seehorn asked me if I would care to go down. I said, "Well, I have nothing in particular to do; we will go down." There was not anything said about business at all to me. Seehorn never kept me informed as to how the business was getting along. I have no information from him or any other source. I know nothing about the lumber business and I couldn't tell whether it was in

(Testimony of Rees T. Jenkins.)

a prosperous condition or otherwise. I paid no attention to their debts. I didn't know that they owed the bank $8,000. I never was told and I did not know. Seehorn told me he was not going to fight the case at Quincy. I have no recollection what I told him. I never told Seehorn he would be permitted to run any business that I was interested in. I never told him that after the decree from Plumas County he could run this mill and operate and pay the creditors. I don't remember what Seehorn told me he wanted out of it. He never asked me for anything. I never promised him anything in money or in carrying on any business that I was connected with it. I knew there were other stockholders. I never discussed with them what was to become of their rights as stockholders. Mr. Reilly came to me about it some time in July or August, 1922. That was after I had been through the court at Quincy. No one came to me before to my recollection. I don't remember of any creditors, to tell you the truth I don't remember except Mr. Seehorn. Mr. Seehorn was the only man I talked to. Seehorn and Reilly. Reilly wanted to know what became of his money. I told him I didn't know what was to become of it. I told him I did not [79] know he had any money in the company. I knew Reilly was a stockholder. He told me so. I was down there to the springs as a guest of his. I couldn't tell you if that is in Monterey County. I don't remember how long this was before I started the suit in Quincy. Nothing occurred down there to my recollection about the

(Testimony of Rees T. Jenkins.)

business. I stayed down there just one night. I got there at midnight and left the next morning. I never had any inventory made after I got the decree at Quincy. I never had one. I don't know if Christy had one. What I told Christy to sell was the timber and what was given me by the decree of the court. Mr. Christy knew more about the thing than I did. He was there and he knew what was there better than I did. The understanding between Christy and I was that he should offer the timber and the mill. I did not claim anything out there that I did not sell to Soule. I sold Soule everything I owned. I do not know what Soule took possession of. My understanding with Soule was that he was to get everything that belonged to me. There was not anything that belonged to me that had not formerly belonged to the company. I do not suppose there was. I do not know if there was anything that formerly belonged to the company out there at the mill that did not belong to me. I don't know of anything that formerly belonged to the company out there that didn't belong to me. I don't remember if I answered in the hearing at Marysville that I was present at a stockholders' meeting in Klamath Falls. I was in Klamath Falls. Seehorn was there. To the best of my recollection Christy was there and there were some other people there that I don't know. I am not acquainted there. They met at somebody's office. Yes, I was sober that day. I could not say the year or month. I know it was cold weather. It was not

(Testimony of Rees T. Jenkins.)

shortly before I started the suit in April. It was the year before when I was in Klamath Falls. [80] It was the winter of 1920 or 1921. I think that was a stockholders' meeting. I never talked about the affairs of the company. I don't remember that the affairs of the company were discussed at that time. I don't know what the meeting was for. I could not tell you how far it is from Reno to Klamath Falls. It is quite a ways. I came to Sacramento, and went up on the train from Sacramento to Klamath Falls. I don't know how many hundred miles it was. I went up there to see if any of my payments were about to come through. That is what I went up there for. Yes I was a stockholder at that time. I don't know if I was president. Never in the world was I called president of the company at that meeting. Mr. Seehorn presided to the best of my recollection and I didn't sit by him. I never considered that I was president and I never resigned. I never gave anyone a proxy to the best of my recollection. I know what a proxy is, yes. I don't remember giving Mr. Seehorn a proxy. I don't remember Mr. Seehorn ever asking me for a proxy. There was a watchman kept on this property during the season 1921–1922. I don't know if he is in court now. I would know him if I saw him. He was supposed to be Mr. Seehorn's son-in-law. He was in charge of the property as watchman when I made this transfer to Soule. I think I instructed him to turn the property over to Soule. I think I did, yes. I think so.

(Testimony of Rees T. Jenkins.)

I did it in person. As near as I can remember I told him the property had changed hands. That's quite a while ago. I don't remember what passed between us. Soule was not there. I don't know whether there was anyone with the man. I don't remember how long it was after the bill of sale. I don't know what I told him to do about it. I must have told him who had bought it. I did not tell him who owned it. I don't remember what passed between us at that time. I know for what purpose I had the [81] conversation with him. The property had changed hands, and he was not needed there any more, I discharged him, or something to that effect. I couldn't say how much I paid him. I paid him because he was supposed to be there as a keeper looking after the property. I don't remember the amount. I couldn't say as to the time I paid him for. I paid him more than a month's wages. I don't remember whether I gave him $100.00 or $150.00. I couldn't say. I had owned the property somewhere about a month or so. I don't remember, to tell the truth, because I didn't pay very close attention to it. I never agreed to pay him anything. I never even knew he was there. As he was there somebody had to pay him I suppose. I did not know he was a creditor. He had been working there. I paid him and I told him his services were no longer required and I don't remember what else I said.

TESTIMONY OF LESTER M. TURPIN, FOR PLAINTIFF.

LESTER M. TURPIN, being called and sworn as a witness for the plaintiff, testified as follows:

I live at Los Angeles. I am thirty-six years old. I am a groceryman. I was in Plumas County in 1921 and 1922. I was watching the mill in this winter, the winter of 1921 and 1922. I was there at the time the mill was supposed to have been sold to a man by the name of Soule. I had been there seven months prior to that time. I was in charge of the mill and the mill was in operation. I was watchman. I was familiar with the property. It consisted of a sawmill and the buildings that usually go with a mill, also machinery. It was a typical sawmill with a camp. Engines, and saws and edgers and so on. I was in charge of everything there in the camp. They had something of a logging outfit. They had tractors and trucks. There were some movable things there. The gasoline trucks were taken out in the fall, they were not left there. There was practically [82] everything to operate a sawmill.

"Q. What part of the machinery was tapped down or bolted down and what wasn't, if you know?

A. All the equipment in the sawmill."

I have worked in sawmills and ran them. I know the names of the edgers and trimmers, the carriage and saws and things of that kind. Those things were there. They had a field outfit for the

(Testimony of Lester M. Turpin.)

woodsmen. They had houses and cottages. They had probably half a dozen cottages, and a bunkhouse and a cookhouse. They had cots and bedding. They had accommodations for about a hundred men. They had cookstoves and ranges, and they had furniture in the office, such as typewriters, adding machines, desks and chairs. They had no railroad tracks outside the lumber yard. They had some sort of steel rails in the lumber yards used for carrying the lumber. The logs were hauled to the mill. I was there for seven months watching. I did not see Jenkins there often. I never did see him there during the time I was there. I knew about the property being supposed to be sold to a man named Soule. I received notice from Mr. Jenkins—written notice—that was all. I haven't the written notice. Naturally, I didn't keep it. I have lost it. It stated that the property had changed hands. That was the sum and substance of it, that it was to be turned over to Mr. Soule. It was signed by Mr. Jenkins. It was not signed in any other way. Mr. Jenkins was president at that time. He paid me six or seven hundred dollars, I don't remember exactly, but I think it was seven hundred, for the whole seven months. The writing simply covered the whole works there. It said, "To Whom It May Concern, this day and date, sold to Mr. Soule." That was the sum and substance of it. I didn't keep the order. Mr. Stephenson had it in his possession at that time. He was the manager for Mr.

(Testimony of Lester M. Turpin.)

Soule and a representative of Soule. He had a copy. I did not keep a copy. Mr. Stephenson had the [83] original order. That is the only way I would have turned it over. I was there for the purpose of looking after the property. Stephenson presented the order signed by Mr. Jenkins telling me to turn it over to him. I didn't put anyone in possession. I just let them take possession. Mr. Soule and Mr. Stevenson took possession. They were together at times shortly after. Mr. Stephenson was alone at the time the paper was presented. I had already met Soule and Stephenson came back the last time and he had the order. Mr. Stephenson took charge at that time. It was two or three weeks later that I saw Jenkins. It was later on that he paid me, probably three weeks. It was before I left the vicinity. Mr. Jenkins was supposed to be president at that time. So far as I know he was represented as president. By "represented" I mean that was the general understanding. I would not have turned the mill over under any other orders except Jenkins or Seehorn. I did not see a great deal of Jenkins, I was there alone what time I was there. I didn't reserve any property at all at the time I surrendered those premises to Mr. Stephenson. I was not told by Jenkins to reserve any property. I was not told that the company had any property there that was not supposed to go.

(Testimony of Lester M. Turpin.)

Cross-examination.

(By Mr. BARRY.)

From the time I commenced there as watchman until Jenkins paid me I never did see Jenkins. Mr. Seehorn hired me. He was managing the property at that time and I never saw Jenkins there at all and I never had a word from Jenkins until he paid me. He never gave me any orders or anything of that kind until this notice was sent out and until this notice was given me by Stephenson. I cannot pretend to remember any more than what I have already stated as to what was in the notice. It was a general notice to turn it over. The property had changed hands. He said he had sold the property and the timber [84] to Soule. I am not sure but what it covered the timber. The sawmill and machinery is the best recollection I have of it. From the time I first went there Seehorn was managing the property. It was probably a month after this notice was sent out to me before I was paid. Up to that time I never had any talk with Jenkins as to who was going to pay me. The lumber that made those cabins was sawed at the mill from timber off the Jenkins land. I don't know whether the McCollum-Christy Lumber Company had any other timber. I was not there at the time the lumber was sawed.

Redirect Examination.

(By Mr. PRESTON.)

I was not there when any operations were carried on by McCollum-Christy Company, but was

(Testimony of Lester M. Turpin.)

there later on when Soule had charge of the mill. Soule was using all the equipment I turned over to him in the fall of September, 1922. There was a tractor there but it was not in operation when I was there. There was a tractor when I was there as a watchman. Soule never used it very much. I don't know that Soule ever used it. After Soule took possession I was there until September. I was running the engine.

TESTIMONY OF W. A. RICHARDSON, FOR PLAINTIFF.

W. A. RICHARDSON was called and sworn in behalf of the plaintiff, and testified as follows:

My name is W. A. Richardson. I am a resident of San Francisco and a member of the bar, with the firm of Devoto, Richardson and Devoto. I knew Mr. Soule in 1922. I had known him previously. I did not act as Soule's attorney at the time of the purchase but subsequently. I had been his attorney many years before that, but I knew nothing of this transaction until 1923. I had something to do with the operation of this plant known as the Bacon-Soule Lumber Co. on the land of Mr. Jenkins. I practically operated the financial end of it during the year 1923. I was frequently on the [85] premises. I think I entered in there in the latter part of June or the latter part of July, and continued there during the year until the mill closed. We were using all the equipment. I know of no equipment that we were not using. I never

(Testimony of W. A. Richardson.)

had any conversation with Mr. Jenkins as to what was supposed to be included in the sale. I had conversation with Mr. Jenkins on the subject of this lawsuit. I talked with Mr. Jenkins two or three times while he was there at the mill. It was while I was practically in charge so it must have been in 1923. It was after this lawsuit, now on trial, was started. It was really last summer. The discussion generally was about this suit and whether or not he had a right to sell the property. I had some misgivings whether or not he was a trustee for the company, being the president of the company, and I talked to him along those lines. He said it didn't make any difference, that he was good for it as far as Mr. Soule was concerned. That is all I was interested in. So far as I know Soule claimed all the property in connection with that mill—real, personal and mixed. It was in use in 1923. Jenkins said he was good for it as far as Mr. Soule was concerned, and Mr. Soule need not worry if any question came up as to whether he had a right to sell it. We did not discuss the question as to there being any property that he had not sold to Soule. We never discussed the question as to whether some was included and some excluded He was at the mill in 1923, probably five or six times during the summer. He was not particularly there to see about the mill, he was a large sheep owner, and his sheep were up there during the summer, and I think he was up there to see the sheep rather than the mill. He was at the mill.

(Testimony of W. A. Richardson.)

Cross-examination.

(By Mr. BARRY.)

He didn't go into details as to what he sold Soule. He was there mostly on his sheep business. I do not know that [86] he took any notice of what was being used there by the people.

TESTIMONY OF W. E. SEEHORN, FOR PLAINTIFF.

W. E. SEEHORN, being called and sworn as a witness for the plaintiff, testified as follows:

I live in Los Angeles. I am the Seehorn mentioned in this procedure and connected with the McCollum-Christy Lumber Company. I was one of the organizers of the company and an officer of the company. I changed my title during 1921 and 1922. I was treasurer and general manager. I don't know the date that I became treasurer but I think it was some time in the fall or the early part of the winter of 1920. We organized in 1920 and I probably became vice-president and treasurer in 1921 and I continued in that as long as the company was in business. Rees T. Jenkins was president. I. D. Whitmore was the first secretary. Mr. Whitlock succeeded him. Whitlock's first name is Earl. I don't think we ever had any other secretary before the suit at Quincy. The directors were changed. I think some of them. There were five of them. I think there was a man named Christy connected with it—George Christy. When I became treasurer and

(Testimony of W. E. Seehorn.)

general manager, Christy was vice-president and succeeded me as vice-president. When I left the office Christy took it and continued to hold it as long as the company was in business. That is true up to the time the bankruptcy proceedings were begun.

"The COURT.—Q. Did I understand you to say that the defendant was president until the bankruptcy?

A. Yes, sir, he was president."

The president was elected. I think we elected officers every year. The principal place of business of this company was Klamath Falls, Oregon. This was an Oregon corporation. Mr. Jenkins was familiar with everything. He was at some meetings—at least three. One was a stockholders' meeting, and the [87] next was rather a business meeting of stockholders and directors, and one was a directors' meeting. The last was in July, 1921. Nothing after that, we shut down after that. The last directors' meeting was held at the mill, in Plumas County; the other two at Klamath Falls. A good many of the stockholders were present at Klamath Falls. I don't remember if the second meeting was a directors' meeting, or a stockholders' meeting, or if there was a meeting of all of us trying to arrange financial matters. I could not tell the date of the second meeting at Klamath Falls. Jenkins came up to the mill quite often. He got a statement, he examined everything, he was shown everything, he always looked at the books.

(Testimony of W. E. Seehorn.)

We kept what we thought was a good set of books at the mill. We always kept them posted. Statements were there; they were shown to him by the bookkeeper. I don't know whether he took them away with him or not; if he didn't it was his own fault. Monthly statements as to what we had done in the way of sawing lumber, and what we expended, and everything, just like a monthly statement. I remember that a suit was begun against the corporation by Jenkins in 1922; service was made upon me. At the time the suit was filed I had an understanding with Jenkins, as to what was to become of the creditors of this corporation. I went with Mr. Jenkins to meet another director, Mr. Reilly. Mr. Jenkins explained to me that this matter had to be settled up, and it would not interfere with the working of the proposition, the mill, that I could go ahead and operate the mill under the same terms, and we could pay off these creditors, and that if there was anything left, it would be, of course, for the stockholders. Mr. Jenkins had furnished to him a list of creditors and the amounts due. He knew all about that. I would have to guess at the approximate liabilities at the time. The books will show all of it; I imagine about $40,000. At the meeting at Paraiso Springs by Reilly, Jenkins and myself we all [88] thought it was in fairly good condition for a sawmill at that time and that it could be pulled through. Reilly was a stockholder and a creditor and he was a director at that time. I went with Jenkins down to see Reilly. I told

(Testimony of W. E. Seehorn.)

Mr. Jenkins the object of the trip; that we would go down and consult Reilly and see if we could not run this thing another year and figure out the best way to do it. Reilly was a creditor for $6,000 cash loaned to the company. He had $5,250 stock. He had about $11,000 in the company. At the time this suit was brought I told a number of the creditors that they would be paid, that I would go back there and run the mill, that I was satisfied all of them would get their money. I was served with a summons in the Plumas County action. I told the directors about it, two or three of them, but they didn't seem to pay any attention to it. Jenkins was still president, he had never resigned. He was a stockholder. He had $15,000 in stock. I have told all the understanding I had with Jenkins. I was to run the mill and pull out the creditors and make something for the stockholders if I could. We had made two former changes in our contract, and, of course, this was the third and I supposed it was last, and if things went all right we would continue. That was the reason I did not put up any defense. I never profited a bit by the judgment. I lost all I had.

"Q. Did you assume, on the strength of this statement of his that you could run this concern for the benefit of the creditors after this judgment was rendered, did you become personally liable for any of the debts of the concern? A. Yes, I did.

The COURT.—What is that question? Read that, Mr. Reporter.

(Testimony of W. E. Seehorn.)

(Question read by the reporter.)

Mr. PRESTON.—[89] That is to show that he assumed personally some liabilities of the company that he paid, and that it was on the strength of the statement made by Mr. Jenkins.

The COURT.—The question is whether he assumed personal liability for the debts of the company?

Mr. PRESTON.—Certain debts of the company.

A. (Continuing.) Yes, I did.

Q. To what extent?

A. I paid money that was borrowed at the Susanville Bank; I think I have the amount here.

The COURT.—The Court, in ruling on objections, allows an exception. It is not a final ruling. If it is material the Court will allow it to go in. If it should be material it will be there for any effect it may have. The Court will give it no consideration if it is not entitled to any.

A. It is around $10,000, interest and all."

WITNESS.—(Continuing.) It was after this suit was commenced at Quincy that I took this over and agreed to pay the bank. I did it because I thought I would have the right to operate the mill and pay the creditors. I gave them $4,500 worth of stock that I had in the Lassen Lumber & Box Co. and I gave them a note for the balance. Yes, I became personally liable for it, interest and all was around $10,000. It was understood pretty well between Mr. Jenkins and Mr. Barry, in their office, up to this time, that I was to run the mill and pay

(Testimony of W. E. Seehorn.)

the creditors. I never was told I could not until after it was sold. I never was told anything about the Soule sale until about a week before the sale came off. Mr. Jenkins told me that if I did not raise $75,000 [90] by Saturday, or that if the other party raised $75,000 by Saturday, they would take the mill. It was three or four days before Saturday. Not over five days. That is the first I heard of the matter. The judgment had already been entered then. I never have seen Mr. Soule. I don't know him. I did not know anything about a sale with Mr. Soule up to that time. I believed I would be permitted to run the mill in the interest of the creditors. I testified in the case at Quincy. I don't remember the substance of my testimony; there was not much to it. We were in default in payments to Mr. Jenkins. We owed Jenkins some money. The first payment had been made, consisting of $10,000 in cash and $15,000 in stock. Jenkins got a check for $10,000. I heard him testify. I understood him to say he did not get the 15,000 shares of stock. At Quincy he said $10,000 had been paid him, the $15,000 shares of stock were not mentioned. The only mention was the $10,000. I sat there through the whole testimony. There was no testimony that he had been paid $25,000. I did not have anything to do with the company after the Soule transaction. I did not go to the mill site after that. I think I was at Reno, or somewhere around there. I don't remember just where I was when I heard of it. The mill was

(Testimony of W. E. Seehorn.)
always considered by Mr. Jenkins as ours and belonging to the company, that is, the equipment.
(Question by Mr. PRESTON.)

"Q. When you entered into this first contract, here, did you believe you would have a right to move the mill off?

A. Yes, certainly, we believed we had a right to move the mill off.

Q. When the company entered into the contract with Mr. Jenkins later on, on the same terms as your other contract, did you believe the company would have the right to move the mill? [91]

Mr. BARRY.—We object to that on the ground that the agreement is the best evidence.

The COURT.—I think so. I would assume, though, that under the law of this state they had the right.

Mr. PRESTON.—I think so, your Honor. I think it is implied in the agreement.

Mr. BARRY.—We don't agree on that."

WITNESS.—(Continuing.) If we sawed any more lumber after the first year or two we would have to move the mill to get to the timber. We did not buy the land. We cut probably 3 million feet of timber. The first year there was not but 200,000 or 300,000 feet cut. I would not say it was more than 3 million feet altogether. The last stumpage we were to pay $4.00—$4.00 for all the three million. There were some modifications in the contract, they were in writing. I am not sure but what I have them. I think I have. The first modifica-

(Testimony of W. E. Seehorn.)

tion called for payments; the next year we could not make those payments, and we made a new agreement. Then, when we made this last agreement, in order to give him more money than what we agreed to pay at $2.50 a thousand we agreed to pay $4.00 a thousand instead of the $2.50; the $1.50 difference was to apply as payment on the timber. The modifications related to the time of payment, and to the change from $2.50 to $4.00 for that particular year, and we were to get credit for that extra money. I don't recall any other changes. I remember getting a notice. I had something of that kind. I think it was served on me. Jenkins never told me he was going to forfeit the mill and keep the mill. He never [92] claimed the mill.

(Question by Mr. PRESTON.)

"In any conversation he ever had with you at any time, did he ever claim the mill—I mean, prior to this judgment?

Mr. BARRY.—Objected to as immaterial under this contract.

The COURT.—Objection overruled.

ANSWER.—No, sir."

WITNESS.—(Continuing.) In any understanding that I had with Jenkins about operating the mill for the interest of the creditors Jenkins never claimed that he owned the machinery. He never mentioned the mill. We always claimed that the mill, the machinery and everything that was movable there, and was not in the ground, belonged to this company or the creditors. That refers to the

(Testimony of W. E. Seehorn.)

engine and the boiler, probably,—I don't know the law as to that; the boiler is practically in the ground. I suppose that could not be moved. The boiler is set on logs, then there is a big 5-foot log set along there, and the engine is bolted to that log. If we moved the mill to another mill site we would have to take the boiler along with it. There wasn't anything else that would do injury to the soil at all if you moved it. The boiler was incased in brick, the foundation is logs. The mill machinery, such as the saws, the edgers, the carriers, could be moved without hurting the building. The value of the engine and boiler at the time of the suit in Quincy was $4,000. It could be replaced for that and then it was second-hand stuff. I am pretty sure we bought that second-hand. Mr. Christy bought it. It cost $3,400, with $800 charges to get it in there. That covers both the engine and boiler. The building without the [93] machinery ought to be built for $6,000. The mill cost us over $80,000. In 1922 it was in very good condition. We spent $4,000 in 1921. I don't know anything about 1922. In 1921 we spent $4,000 in 1921. I don't know anything about 1922. I ran it in 1921. In 1921 we spent $4,000 making it better than it was, in the way of new saws, and new tracks, and new machinery. In 1921 the lumber business was very poor; it was about the worst year we had in the lumber business, very poor prices. The mill cost about $86,000. I was not there in 1922. It was in fine condition when they started in. I don't know what was done

(Testimony of W. E. Seehorn.)

afterwards. It was all ready to operate. All they had to do was to put the belts on and start up. The mill had only cut about 3 million feet at that time with the exception of the engine and the boiler everything else was brought in. $50,000 was a very reasonable price on the 6th day of June, 1922, for the mill. In my opinion, it was worth in excess of that amount. If you deducted the engine and the boiler it would still be worth $50,000.

W. E. SEEHORN.—At the meeting we held in July, 1921, we had a superintendent we wanted to get rid of and it took a directors' meeting to get rid of him. He was hired by the directors and I did not have the authority to discharge him; Jenkins and Reilly were present. The meeting took place in the presence of Jenkins.

The COURT.—"Q. Did you fire the superintendent?

A. Yes, sir."

I had furnished to me from time to time statements of the financial condition of the company. I always showed these to Jenkins. He had access to those things and I suppose he got one every month. I showed him the statements a number of times. [94] I discussed with him personally during this period of time the financial condition of the company. There was a pooling agreement made at one time by the stockholders. I remember something about the paper you show me. It looks like Jenkins' writing. That must have been about the latter part of 1920 or the early part of 1921. It

(Testimony of W. E. Seehorn.)

was to borrow some money to keep the thing going over there.

Plaintiff offered the document in evidence and it was admitted and marked Plaintiff's Exhibit 8 and is as follows:

PLAINTIFF'S EXHIBIT No. 8.

"McCOLLOM-CHRISTY LUMBER COMPANY.

We, the undersigned stockholders of the McCollum-Christy Lumber Company believing it to be to our interest as such stockholders to pool our stock for a period of 18 months for the purpose of enabling the proper officers and directors to use said stock for the borrowing money for the use and benefit of the corporation, do hereby agree each with the other and others as follows:

1. All of our stock shall be turned into the treasury of the company for a period of 18 months during which time the president, or general manager, or Board of Directors, may hypothecate any part or all of said stock to any person, firm or corporation or any one or more of them to secure any amount of money they may borrow for the use and benefit of the company.

2. The money so borrowed shall be used for the purpose of paying bills and accounts of the company, conducting logging operations, construction purposes, and such other purposes for the benefit of the Company as may seem meet and proper by the proper officers and board of directors.

Name	Number of Shares.	Amount.
T. M. Garich	2,000	$ 2,000
W. J. Roberts	5,000	$ 5,000
[95]		
W. R. Boyd	5,000	$ 5,000
K. Sugarmo	4,800	$ 4,800
W. P. Johnson	10,000	$10,000
Glenn M. Fountain, by P. L. T. Atty.-in-fact	2,500	$ 2,500
W. E. Seehorn	22,500	$22,500
R. T. Jenkins	15,000	$15,000
C. F. Setzer	5,500	$ 5,500
Geo. H. Merryman	5,850	$ 5,850
Geo. H. Burton	1,500	$ 1,500"

The paper you show me is signed by a name that looks like Jenkins' signature.

Counsel then offered the letter in evidence which was admitted and marked Plaintiff's Exhibit 9 and is as follows:

PLAINTIFF'S EXHIBIT No. 9.

"San Francisco, California, November 22, 1921.

McCollum-Christy Lumber Co.,

Portola, California.

Gentlemen:

This is to notify you that I hold a promissory note of your company in the sum of $3500.00 which is due and on which neither principal nor interest has been paid. Your Company is also indebted to me on a certain contract for cutting of timber entered into between the Company and myself in

(Testimony of W. E. Seehorn.)

1920, on which payments in the sum of $75,000.00 are past due and unpaid.

Your company is also indebted to me for timber cut from my holdings under special contract in 1921, and manufactured into lumber in your mill during the said year, and this item is about the sum of $12,000.00. Nothing has been paid [96] on this debt.

You are hereby advised that unless these items totaling about $90,000.00 are paid in full immediately I shall institute action in the courts for the recovery of the money. I am unable to wait longer, or to suffer any further delay and prompt action must be taken if you are to avoid the trouble which the suits will necessarily bring about. This is the last and final notice which I shall give in this matter and I consider myself free to take action at any time from now on.

Yours truly,

R. T. JENKINS."

It was admitted that the signature to the foregoing was the signature of Jenkins.

WITNESS. — (Continuing.) The consideration for the $3,500 was money advanced by Jenkins to Christy and myself to pay off the men in 1920. I explained to him what the money was for and it was used for that object. I don't know that I ever told him I had used it for that purpose but that was what it was borrowed for. Three million feet of lumber were cut under the contract and we were to allow $4.00 a thousand to be credited on the con-

(Testimony of W. E. Seehorn.)

tract price. In addition to the mill property we bought in logs on the deck for use the following spring; we had some cut in the woods that were not hauled. I could not tell you how many thousand feet of logs were cut but the items are in the books and were found on the last statement. There was a little lumber manufactured on the ground at the time the mill closed down in 1921. We owned a telephone line. We had office furniture, bunkhouses, cookhouse and cabins, two barns, and a commissary. We had an adding machine and a small tractor. [97]

Cross-examination.

(By Mr. BARRY.)

Was Jenkins a director?

No, Jenkins was elected president. I think he was considered a director too but I don't remember. I don't know, the books will show that, I don't know whether he was a director or not. I had a conversation in your office and in your presence in which he told me he was going to let me have that property. That was in the early part of the winter before this sale was made, before this settlement at Quincy. I never had a conversation with Jenkins in which I told him if he would turn the property over to me I would take charge of it and pay him and would let the rest go. That was not my idea. Jenkins never signed any pay checks. He never did sign any checks. He paid the watchman. That was all he ever paid and that was quite a while after he had made the sale to Soule. I

(Testimony of W. E. Seehorn.)

attended to signing the checks in 1921. As I stated about this superintendent, he was hired by the directors. I had the management outside that one man. After we got rid of him I had the full management. The McCollum-Christy Company never cut any timber in that country that did not come off the land of Jenkins. It was all Jenkins' timber, all the buildings, and houses and everything that was made of lumber was made from timber on Jenkins' land. When this suit was brought in Plumas County the company was in default in their payments to Jenkins. I don't know just what it was. They never did make but one payment and that was $10,000. They gave him $15,000 in stock. They owed all the payments that were due at the time the suit was brought in Plumas County. We made an agreement after the first one. They did not pay anything until the end of the year. The first agreement was made with me and I turned that to the company at a profit of $1.50 a thousand. I made something like $90,000 on that turn, on paper. I did not get all the [98] money though. I did not get all that stock. I know Jenkins got his stock. It was issued to him. I know it was issued to him and I know I gave it to him myself. The books show it was issued to him. I haven't anything to do with the books. I was not anxious to have that suit brought in Plumas County. I had nothing to do with it. I didn't phone from Beckwith and ask why you didn't send out and serve me. I don't remember sending you a tele-

(Testimony of W. E. Seehorn.)

gram from Ukiah telling you I was coming over and telling you where I would be so you could serve me. I sent you a number of telegrams but I don't remember this particular telegram. I don't remember anything about telephoning you from Beckwith. I won't say it did not happen. I don't remember anything like that did happen.

Mr. PRESTON.—"Mr. Barry, will you stipulate that the record shows that the Rees T. Jenkins certificate No. 1 for 15,000 was issued on June 3, 1920, and received and signed for—receipted for by Mr. Jenkins on the same day?

Mr. BARRY.—No, it was not; it was signed and receipted by W. E. Seehorn for Jenkins.

Mr. PRESTON.—Rees T. Jenkins, by W. E. Seehorn.

Mr. BARRY.—And 'Rees T. Jenkins' is signed by Seehorn.

Mr. PRESTON.—Yes, that is right."

WITNESS.—(Continuing.) I never was there after Soule took possession of the property. I don't know Boyd, the trustee, plaintiff in this action. I don't know if the trustee went up there and took steps to take possession of the property. I don't know the [99] man at all. I never had possession after the sale to Soule. I had been managing the property up to that time. I did not have any chance to take any possession of it; it was sold, so they told me and I supposed it was. That 3 million feet stumpage was never paid to

(Testimony of W. E. Seehorn.)

Jenkins so that is $12,000 that never was paid to him.

Redirect Examination.

(By Mr. PRESTON.)

In the courtroom during the time that this Plumas County case was being tried Mr. Jenkins and I told Mr. Barry that the amount was not right, the Court not being informed of the 15,000 shares and he said that the Court understood that. I referred to the fact that there had been no testimony about the 15,000 shares and he said he thought the Court understood it.

TESTIMONY OF M. F. LOOSELY, FOR PLAINTIFF.

M. F. LOOSELY, being called and sworn, testified on behalf of the plaintiff as follows:

I was in business in Beckwith, Plumas County, in 1921 and 1920 and 1922, general merchandise business. I am a creditor of the McCollum-Christy Lumber Company, somewhere around $1200. It was understood by all the business people around Beckwith and Portola that Mr. Jenkins was president, Mr. Seehorn manager, and Mr. Flynn, superintendent. The indebtedness was incurred in that belief and on the strength of that the account was opened. After the suit in Plumas County I made an effort to see Mr. Jenkins. I was in Reno and called at his home but did not find him at home. I went up to Mr. Barry's office, understanding that he was Mr. Jenkin's attorney in the matter.

(Testimony of M. F. Loosely.)

The suit had been filed then. I asked Mr. Barry what disposition was going to be made of my account along with the balance of the creditors. He said that Mr. Jenkins was making arrangements to take care of those. I believed that and acted upon it. I expected I would have to attach. Mr. Barry asked me what my [100] claim was and I told him. He said, "Well, I will be damned, there are a lot of accounts out, aren't there?" It was then that he remarked that Mr. Jenkins was arranging to take care of them. I believed it until after this suit was tried. I am familiar with this mill property in a general way. I have been a builder of mills in times gone by. It was supposed to be a first class mill. There was some second class machinery. The second-hand machinery was the engine and the boiler. I would say the mill should have been worth $55,000 or $60,000.

TESTIMONY OF E. M. NEESE, FOR PLAINTIFF.

E. M. NEESE, being called and sworn, testified for the plaintiff as follows:

I am an accountant, I live in Los Angeles. In 1920 I lived in Klamath Falls, Oregon. In 1921 at Beckwith, or Portola, at the McCollum-Christy Lumber Company. I did some work in straightening out the books of the McCollum-Christy Lumber Company, in 1920, at Klamath Falls. I worked at a later date in May, 1921. I was the last man out of the camp. I spent my time there contin-

(Testimony of E. M. Neese.)

uously from May until the mill closed down. I took the watchman up into the camp and then came out. I have the ledger account kept by me. The books are here. I have seen it since I came to court. I made a transcript of the account as to items. I took it from the books. I know they are correct because they balance. There was a balance sheet taken off every month. As to the entries there of items of equipment, such as logging equipment, office equipment, bunkhouse, cookhouse, etc., they are the correct items on the ledger account and made from the original records or invoices. I took an inventory before leaving the camp.

Counsel for plaintiff then offered Ledger Account, #41 to which Mr. Barry objected on the ground as immaterial. The objection was overruled and the Court stated that so far as not material the Court would give it no consideration. [101]

WITNESS.—(Continuing.) Ledger Account 41, Logging Equipment, $2,747.34. That includes one Cletrac tractor, purchased from Sierra Auto Supply Co. for $1,695. It includes inventory of small items aggregating $100 or $200. The account seems short about $750. I have read that from this sheet which covers the first item. The next item in the bunkhouse, ledger account 44, which shows a cost of $2,798.25. This includes the building, $1,366.12, and the balance of $1,432.13 includes about 40 iron cots, 40 mattresses, and 4 excellent tents about 10 by 10. Ledger account 45,

(Testimony of E. M. Neese.)

cookhouse, $2,493.31. There is an inventory of the smaller articles in the cookhouse. The inventory does not list one Wedgewood range, and does not list the building, which cost $686.80, and appears from the account. Those are cost prices. The logging equipment $2,747.34, that is $750 short, that means tools and equipment that was bought but not charged into the account; they were charged into monthly operating. That would take care of depreciation. In other words, there was $750 more than $2,747. The next is cottages, $816. Three buildings, each two rooms, back and front porch, the porches enclosed, and woodshed. The buildings rest on mud sills, and were, in fact, moved from one place to another. Also two cabins about 10 by 10 on sticks and moveable. Cottages, $816; cabins $100; Total $916. The next item is barn. Buildings $417.51; inventory of contents, $49.76; Total $467.26. The next is commissary, and is as follows: Building, $359.76; Gas tanks, $666.45; Gas pump, $175; Total $1,201.21. The inventory of October 28, 1921, of supplies amounts to about $75.00, which is in addition to the above. The next is telephone line, $128. About 10 miles of line, including phones, and poles, all in working order. [102]

Then under the heading, "Logs," appears the following:

"LOGS.

Memorandum December 31, 1921.

290676 feet on deck at mill
60000 " fell, bucked and limbed by
EHB.—Woods— 2331.45

(See ledger acct. #33)

Stumpage at $2.50 ..... 875.00
Total .....

$3206.45

Memorandum December 31, 1921.

38,000 feet fell
122,780 turned out
90,690 feet bunched 374.20

374.20

(Ledger acct. 25.)

251,470 feet.
Add stumpage at $2.50 ..... 628.00

$1002.20

$3206.45
1002.20

Total $4208.65

LUMBER ACCOUNT 34:

382,777 feet valued at $6,287.24. This as approximately $16.34 a thousand.

In support of the foregoing book value we have the following

274 pile bottoms—340 feet each makes 93,160 feet @ $18 a thousand.

Yards and trams 208617 feet @ $18 ..... $1676.88

3755.10

Total of the foregoing 301777 feet..... $5431.98

6000 feet of culls

75,000 feet of stickers

81000 feet at 10.58 plus ..... $ 857.26

[103]

Summary pile bottoms 1676.88

Yards and trams 3755.10

Culls and stickers 857.26

Total $6289.24

There is about 4,000 feet of rails included in the yards and trams.

"SAWMILL AND EQUIPMENT—Ledger Account 40:

The value of the sawmill building is $5012.50 (See ledger account 40, journal page 20.)

Book value of equipment $46,365.05

Building 5,012.50

Sundries 3,918.86

Total $55,296.41

Of the foregoing we take as our value .. $46,365.05

Subtract engines and boilers 4,200.00

Balance—Sawmill equipment $42,165.05

(Testimony of E. M. Neese.)

Included in the foregoing are the following:

12 cars—$600.00.

Equipment of the blacksmith shop.

Tools, concerning which Christy testifies (page 32) that they were worth $500.00 or $600.00.

250 feet of pipe-lines.

Invoice from Summer Iron Works—$11,340.45.

(See book C, page 1, June 15, 1920, page 3, August 7, 1920, to which should be added freight and cost of installation.)

As to the cost of the boiler, Christy testifies (page ——) that it cost $3,400 plus $800 freight. This entry appears on the Cash-book, page 1, June 15, 1920, American Machines Works—$3400. [104]

See the inventory and check out items not contained in the Summer Iron Works invoice.

Included here are 28 or 30 cars for tramways.

Ledger Account 43—Office Equipment—$440.00.

Includes desk— $180.00.

Typewriter 64.00.

Adding machine 196.00.

These items, when put together, make the Logging Equipment, Office Equipment, Bunkhouse, Cookhouse, Cottages, Cabins, Barn, Commissary, Telephone Line, Logs, Lumber, Sawmill and Equipment, $61,927.36, excluding the engine and boiler, and mill building and sundries; and if they be included, it will be approximately $1200 more."

WITNESS.—(Continuing.) During the year 1921 I saw Jenkins a number of times. He had access to the books and one Sunday morning went

(Testimony of E. M. Neese.)

over the books with me for several hours. That was the latter part of July, 1921. He went over the system in which the books were kept, and looked over the accounts and the manner in which the accounts were kept.

Plaintiff then offered in evidence yellow sheets, which were admitted and marked as Plaintiff's Exhibit 10 and are as follows:

PLAINTIFF'S EXHIBIT No. 10.

LEDGER ACCOUNT.

41	Logging Equipment	$2747.34
43	Office "	440.00
44	Bunkhouse	2798.25
45	Cookhouse	2493.31
46	Cottages	816.—
	Cabins	100.00
47	Barn a/c	417.51
58	Commissary	1201.21
[105]		
91	Telephone Line	128.00
33	Logs (25)	2331.45
34	Lumber (Yards and trams)	3755.10
	Pile Bottoms	1676.88
	Stickers & Culls	857.26
		19,762.31
40	Sawmill & Equipment	42,165.05
		$61,927.36

LEDGER ACCOUNT 41—LOGGING EQUIPMENT—$2,747.34.

Includes 1 Cletrac Tractor purchased from Sierra Auto Supply Company for $1695.00. See Journal, page 21.

Includes inventory of small items aggregating $100.00 or $200.00. The account seems short about $750.00.

LEDGER ACCOUNT 44 — BUNKHOUSE—$2,-798.25.

This includes building—$1366.12, and the balance of $1432.13 includes about 40 iron cots; 40 mattresses and 4 excellent tents about 10x10.

LEDGER ACCOUNT 45 — COOKHOUSE—$2,-493.31.

There is an inventory of the small articles in the cookhouse. The inventory does not list one Wedgewood Range and does not list the building which cost $686.80 as appears from the account. See J. P. 6, October 15, 1920—James Graham Mfg. Co. $319.50. Inquire if this is not the range.

P. J. 6	Portola Hardware Company	$35.58
	.....	46.05
P. J. 9	" " "	30.79
P. J. 10	Shawbatcher	56.14
P. J. 13	"	5.28
P. J. 13	"	13.68
P. J. 13	"	43.13
P. J. 16	"	49.31

[106]

LEDGER ACCOUNT 46—COTTAGES—$816.00.

Three buildings, each two rooms, back and front porch; the porches enclosed, and woodshed.

The buildings rest on mud sills and were, in fact, moved from one place to another. These buildings contain heating stoves.

There were also two cabins about 10x10 on sticks and movable. (No account on ledger for these cabins.) They were worth $50.00 each. (See Chrysty's testimony, page 34, for value.)

Cottages	$816.00
Cabins	100.00
Total	$916.00

LEDGER ACCOUNT 47—BARN.

Buildings	$417.51
Inventory of contents	49.76
Total	$467.26

LEDGER ACCOUNT 58—COMMISSARY.

Building	$359.76
Gas Tanks	666.45
Gas Pump	175.00
Total	$1,201.21

The inventory, October 28, 1921, of supplies amounts to about $75.00, which is in addition to the above.

LEDGER ACCOUNT 91—TELEPHONE LINE —$128.00.

About ten miles of line, including phones and poles, all in working order. [107]

LOGS.

Memorandum December 31, 1921.

290676 feet on deck at mill.
60000 feet fell, bucked and limbed by EHB.—WOODS—2331.45

350676	2331.45 (See Ledger Account 33).
Stumpage at $2.50	875.00
Total	$3206.45

Memorandum December 31, 1921.

38,000 feet fell
122,78 feet turned out

90,690 feet bunched	374.20
251,470	374.20
(Ledger Account 25.)	
Add stumpage at $2.50	628.00
	$1002.20

$3206.45
1002.20

Total $4208.65

LUMBER Account 34.

382,777 feet valued at $6,287.24. This is approximately $16.34 a thousand.

In support of the foregoing book value we have the following:

274 pile bottoms—340 feet each makes 93,160 feet @ $18.00 a thousand	$1676.88
Yards and trams 208617 feet @ $18.00 .	3755.10
Total of the foregoing 301777	$5431.98
6000 feet of culls.	
75000 feet of stickers.	
81000 feet at 10.58 plus	$ 857.26

[108]

Summary pile bottoms	1676.88
Yards and trams	3755.10
Culls and Stickers	857.26
Total	$6289.24

There is about 4000 feet of rails included in the yards and trams.

SAWMILL AND EQUIPMENT — Ledger Account 40.

The value of the sawmill building is $5012.50 (See Ledger Account 40, Journal Page 20.)

Book value of equipment	$ 46,365.05
Building	5,012.50
Sundries	3,918.86
Total	$ 55,296.41
Of the foregoing we take as our value .	$ 46,365.05
Subtract boilers and engines	4,200.00
Balance—Sawmill Equipment	42,165.05

(Testimony of E. M. Neese.)

Included in the foregoing are the following:

12 cars—$600.00.

Equipment of the blacksmith-shop.

Tools, concerning which Christy testifies (Page 32) that they were worth $500 or $600.

250 feet of pipe-line.

Invoice from Sumner Iron Works—$11,340.45.

See Book C, page 1, June 15, 1920, page 3, August 7, 1920, to which should be added freight and cost of installation. As to the cost of the boiler Christy testifies (page 26) that it cost $3400 plus $800 freight. This entry appears on the Cash Book, page 1, June 15, 1920, American Machine Works $3400. See the inventory and check out items not contained in the Sumner Iron Works Invoice. [109]

Included here are 28 or 30 cars for tramways.

LEDGER ACCOUNT 43—OFFICE EQUIPMENT—$440.00.

Includes desk	$180.00
Typewriter	64.00
Adding Machine	196.00

Cross-examination.

(By Mr. BARRY.)

I saw the property I have just described the last time when I left the camp. I took Mr. Turpin up into the camp. That was along about the first of December, 1921, and it was all there when I left the camp with the records. I checked it off and it was all there and then I left. I was in the camp when it was operated by the Bacon-Soule Company.

(Testimony of E. M. Neese.)

I did not work for them. I don't know why Jenkins went over the books, other than he wanted to see how the books were kept. I could not say that he was looking them over to see what the chances were to get his money. There was a superintendent, a man named Flynn, who looked after the operation of the mill until the latter part of July. That was just about the time when Mr. Jenkins went over the books. They held a meeting and Mr. Flynn was released the 1st of August, if I remember correctly. The books will show. I think it was the first of August. After Flynn was released Seehorn ran the mill. Mr. Seehorn signed the checks. Jenkins never signed any paper there in my presence.

Redirect.

(By Mr. PRESTON.)

When I saw this property later when Soule was operating it I saw the same property that I left there the season before. It was in use by the new management. The mill was in good shape to run as soon as the season opened the next year. Jenkins was known as president, during the time I was there in 1921.

(By Mr. BARRY.)

I had no business there after Soule took possession [110] and I did not check up the property.

Plaintiff rests.

Counsel for defendant now offered in evidence an unsigned copy of an agreement between defendant Rees T. Jenkins and B. C. Soule of date May 20th,

1922. The document was admitted and marked Defendant's Exhibit 11 and is as follows:

DEFENDANT'S EXHIBIT No. 11.

"AGREEMENT.

THIS AGREEMENT made and entered into this 20th day of May, 1922, by and between REES T. JENKINS of the County of Washoe, State of Nevada, the party of the first part, and B. C. SOULE of the County of Alameda, State of California, the party of the second part:

WITNESSETH: That the said party of the first part, for and in consideration of the covenants and agreements hereinafter contained, does by these presents, sell to the party of the second part, one certain sawmill, engine and boiler now upon the lands of the party of the first part, in Grizzly Valley, in the County of Plumas, State of California, and the same being known and described as the McCollum-Christy Lumber Company mill, for the sum of Fifty Thousand Dollars ($50,000.00) as follows, to wit: $25,000.00 on or before the 25th day of May, 1922, and $25,000.00 on or before the 25th day of June, 1922; and upon the payment of the said sum of $50,000.00 at the times and in the manner hereinabove described, the said party of the first part will make, execute and deliver to the said party of the second part a bill of sale for said sawmill, engine and boiler; and said party of the first part further agrees to sell to the said party of the second part and said party of the second part agrees to buy all standing, merchantable mill-

ing timber now [111] standing and growing upon about 3680 acres of land owned by the party of the first part in Grizzly Valley; on or about 1080 acres in Squaw Valley and on about 760 acres in Last Chance Valley, or a total of 5520 acres owned by the party of the first part, all in the County of Plumas, State of California, at $2.50 a thousand for all the uncut portion of such timber, as shown by the cruise thereof hereto attached and marked Exhibit 'A' and made a part hereof, upon the following terms and conditions: $25,000.00 on or before the 25th day of July, 1922, and $25,000.00 per year, payable on the first day of November of each year, beginning November 1st, 1923, until all of said timber has been paid for at the rate hereinabove provided. All deferred payments of said sum of $25,000.00 per year shall bear interest at the rate of 6% per annum from the —— day of ——, 19——, until paid.

In case the party of the second part hereto desires to cut or remove more timber in a season, than payments cover for that year, then the next full payment of $25,000 must be made before any more timber shall be cut.

The party of the second part may make a full payment at any time.

The party of the second part shall have one year from date to this option to recheck and recruise the above timber. In the event of such recruise, each party hereto may select a cruiser and said two cruisers may select a third cruiser and the

estimates of a majority of said cruisers shall be final.

The party of the second part shall have ten years from date hereof provided that he has fully complied with all of the terms of this agreement, in which to remove said timber and in the event said timber is not removed in that time, the party of the second part will pay all taxes levied or assessed [112] against the timber value of said lands and ten cents (10¢) per thousand for the timber a year until all the timber is removed.

The party of the second part shall have the privilege of moving said mill on to other lands and to erect one or more mills for the manufacture of timber herein mentioned and is to have the privilege of manufacturing any adjoining timber in said mill or mills, provided, however, that said mill shall not be removed on to lands of other parties if the party of the second part is in default in any payment due at that time.

The party of the second part is to have the rights of way of logging and marketing of said timber and may use such small timber as he may need for milling and logging purposes.

All taxes, beginning with the year, 1922, levied or assessed against the lands described in this agreement, are to be paid by the party of the first part, except that the party of the second part shall pay all taxes levied upon said lands by reason of their timber value.

It is further agreed that at any time after the said first payment shall have been made, the second

party shall have the privilege to enter upon said lands or any lands adjacent thereto owned by said party of the first part in said Plumas County, State of California, and erect such mill or mills, road or roads or other apparatus for manufacturing timber or lumber as shall be necessary to enable said party of the second part to manufacture said timber into commercial form.

There is also hereby granted a right of ingress and egress to and over any of said lands that may be necessary to construct said mill and equipment and to market said lumber and for general uses in connection with milling operations on said lands; provided, however, that if it becomes necessary to construct or repair roads for said purposes, then the said party of the second part agrees to construct and keep in repair the said [113] roads at its own cost and with as little damage as possible to the land through which they shall be constructed.

It is further understood and agreed that in conducting milling, merchandising and all other operations in connection therewith on said lands by the said party of the second part, that the same shall be done with as little damage or injury to said lands and with as little interference with the use of the remainder of said lands owned by said first party for any such purpose or purposes as he shall at any time during the continuance hereof elect to use said lands for.

It is further agreed that in the use of said lands by said party of the second part, he shall at all times conduct all operations subject to the require-

ments of the Federal, State and County laws and ordinances and will pay all licenses or any other payments required to be paid for and on account of said milling or other operations carried on by the said second party to the Federal, State or County Government.

It is further agreed that in conducting said milling and other operations, including logging operations, the said party of the second part shall and will at all times do so with as little damage to the growing and unmerchantable timber on said lands as may be, and will suitably and properly and lawfully control and care for all sawdust, brush and other refuse resulting from said logging and milling operations and at usual and proper times make disposition thereof as may be required by law or shall be essential to prevent forest and other fires.

It is further agreed that in the construction of any roads or logging ways on any portion of said lands during the continuance hereof, the said party of the second part shall not interfere with or obstruct the natural or other flow of such streams or streams, as shall be intersected in the construction of said roads or logging ways, and the said party of the [114] second part shall at its own cost and expense construct the culverts and bridges necessary to keep such waterways flowing in the way they have flowed theretofore, or are then flowing.

It is further agreed that this agreement shall in no wise be construed as a lease of the said lands upon which timber hereinabove described shall be

standing and growing, and the party of the second part shall have no right to use said lands for any purpose other than logging and milling and marketing said timber and shall, under no circumstances, be permitted to graze any stock whatsoever upon said lands or any portion thereof, and it is further agreed that the party of the second part using said lands for the purpose hereinabove set forth, will keep all gates closed now or hereafter placed upon said lands by the party of the first part.

Said party of the second part further agrees that at the expiration of said period of ten (10) years, or on prior termination for any cause, it shall and will surrender to said party of the first part, his agent or attorney, peaceably and quickly the said lands and the whole thereof and in as good order and condition, reasonable use thereof and damage by the elements excepted as the same now are or may be hereafter put into, and not to make or suffer any waste thereof, nor lease, nor underlet, nor permit any person or persons to occupy, use or improve the same or any part thereof, excepting with the approval in writing have been first given by the said party of the first part.

It is further agreed that said second party shall and will at all times keep posted in two or more conspicuous places on said lands, including one on said mill, notices signed by said party of the first part in substance and to the effect that said first party is not and shall not be or become liable for or obligated to pay for any labor, materials or [115] supplies furnished to or used by said

second party in making improvements or conducting any operations on said lands, as aforesaid.

It is further agreed that time is of the essence hereof and that a failure on the part of the said party of the second part to make the payments herein provided at the times and in the manner hereinabove set forth, or to lawfully keep and perform any or all of the covenants herein contained shall be and constitute a breach hereof and that then or thereafter the said party of the first part may at his option declare this agreement forfeited and all rights thereunder terminated and ended and all sums theretofore paid shall be forfeited to the party of the first part.

It is further understood and agreed that this agreement shall apply to and bind the heirs, executors, administrators, successors and assigns of the parties hereto.

It is further understood and agreed that this agreement shall apply to and bind the heirs, executors, administrators, successors and assigns of the parties hereto.

It is further understood that the party of the second part shall not cull or cut the best timber from said land, but that when he has commenced to cut on any legal subdivision of 40 acres, he must finish the cutting of all merchantable timber on that forty acres before commencing to cut on another forty.

All personal property owned by the party of the first part used in and about said mill and in

the kitchen and bunkhouses and in said mill, are hereby conveyed to the party of the second part.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals and executed these presents in triplicate, this —— day of May, 1922.

————————————. (Seal)

————————————. (Seal) [116]

Counsel for defendant then offered in evidence a telegram of date March 22, 1922, to Rees T. Jenkins signed by Earle Whitlock. The document was admitted and marked Defendant's Exhibit 12 and is as follows:

DEFENDANT'S EXHIBIT No. 12.

"WESTERN UNION TELEGRAM.

1922 Mar 22PM 9 54

A417 S. F. 46 NL.

Klamath Falls Org. 22.

Reese T. Jenkins

Reno Nev.

Unable to get you on phone at San Francisco today Answering your wire to Merryman will say seems hopeless that anything will be done here Advise you take your own course in matter to best protect yourself Have done all in my power but to no effect.

EARL WHITLOCK.

Telephoned to wife.
By MA.
Time 747 a
Disposition."

Office of the County Clerk
of the County of Plumas,—ss.

I, F. R. Young, County Clerk of the County of Plumas, in the State of California, and *ex-officio* Clerk of the Superior Court of said Plumas County and State aforesaid, hereby certify that I have compared the foregoing copy with the original Exhibit No. 2 in the above-entitled matter filed in my office on the 6th day of May, 1922, and that the same is a full, true and correct copy of such original and of the whole thereof.

Witness my hand and the seal of said court this 21st day of March, A. D. 1923.

F. R. YOUNG,
Clerk. [117]

Counsel for plaintiff asked for the production of the wire from Jenkins to Merryman or a copy thereof. Counsel for defendant stated they didn't have it.

TESTIMONY OF REES T. JENKINS, FOR DEFENDANT.

REES T. JENKINS, being called and sworn, testified for the defendant, as follows:

No such conversation as related by Mr. Seehorn ever occurred in your office to my knowledge. At the time prior to the commencement of the suit in Plumas County and while the suit was pending in

(Testimony of Rees T. Jenkins.)

Plumas County relative to letting him have the property. Seehorn talked to me at different times about the way everything was going on; that he couldn't do anything with bunch, that is, with the stockholders in Klamath Falls; he could not carry on the business any longer with them, and if I would take the property over then he would take it upon himself to run the mill, he and one or two more—I don't know who the one or two more were, I never asked him. That was his proposition to me. He said something to me about the creditors and the rest of the stockholders. He said they could take care of themselves. That is what Seehorn told me in Reno. I never at any time told Seehorn that when I got through with the suit in Plumas County I would let him have the property.

Cross-examination.

The conversation occurred in Reno. It was in the month of April, 1922. I believe I had started the suit at that time. Just Mr. Seehorn and myself were present. He asked me to take the property over and let him run it. He wanted to take in two or three of his friends. I was supposed to get paid on my former agreement. It was to take the title over to the entire mill. That is the way I understood it. What he wanted was for me to give him the mill under certain conditions. I never agreed upon any terms. I was supposed to get paid. The thing had not gone through at that time. I was supposed to get the money they owed [118] me, the interest, and what money I had advanced. I

(Testimony of Rees T. Jenkins.)

was supposed to get everything that was due me. I had not got anything on my former agreement. I was to get my interest and what money I had loaned them. I don't know exactly how long the conversation lasted, probably an hour or so. I don't know what satisfied Seehorn so that he did not fight the suit. I didn't promise him anything. I didn't tell him I was going to keep the mill or anything about it. I didn't tell him I was going to claim the mill. To the best of my recollection I didn't tell anybody I was going to claim the mill. It was an afterthought to claim the mill. To the best of my recollection I never told him anything. It is not true that Mr. Seehorn and I had a definite understanding. There was no understanding, that Mr. Seehorn should have any rights whatever after the decree was entered in the court in Quincy. There was no agreement whatever. I did not know whether the court would grant me the decree or not. There was no understanding that Mr. Seehorn should have any rights whatever after the decree was entered in the court in Quincy. I did not satisfy Mr. Seehorn on anything. He thought, I presume, from the way he acted, that I had been so lenient with him all the time theretofore that he could take me into this the same as he did formerly.

"Q. You fooled him once, didn't you?

A. Well, yes."

I don't recollect that Seehorn went over to Mr. Barry to tell him that the Judge did not understand about the $15,000 worth of stock. Mr. Seehorn was there to talk for himself.

TESTIMONY OF N. J. BARRY, FOR DEFENDANT.

N. J. BARRY, being called and sworn, testified for the defendant as follows:

I reside in Reno, Nevada, and am practicing law in Nevada as well as in California. I am attorney for Rees T. Jenkins in this case and I have been his attorney before [119] this case. I advised Jenkins prior to the bringing of the suit in Plumas County as to his legal rights in respect to the property. When they first came in on the 20th of May to write this completed agreement Soule offered $35,000 for the mill. Jenkins and I went into another room in my office and talked it over. We came back and Jenkins told him he would have to have $50,000. They said all right. After that was agreed to there was some talk about other property out there. You will notice in that agreement there was a space left at the bottom for some extra writing; I always leave a space at the bottom of an agreement, so that if there is anything else we won't have to rewrite it; we can put it in; you will notice that there is written in there the language as to the personal property he conveyed out there, everything that was owned by Jenkins. The reason for this was: I told them there was a lot of stuff that didn't belong to Jenkins, that all that he claimed was the fixtures, that is, if there were cabins there, the cabins would go; if there was a range there, or anything fastened to the ground, those would be fixtures; but

(Testimony of N. J. Barry.)

if there was a wagon, and logging equipment, and other things out there that were loose, that those did not belong to Jenkins. I would not permit Mr. Jenkins to put in anything else. Soule understood that at the time. I heard the testimony of Mr. Seehorn as to a conversation had between Mr. Seehorn and Mr. Jenkins in my presence in Reno in regard to Seehorn taking over this property after the suit in Plumas County was completed. No such conversation ever took place in my presence. I heard Seehorn's statement that he did not *th* he ever telephoned to me from Beckwith asking me to serve him with a summons in the Plumas County Case. He telephoned me and told me where he was and that I could serve him. [120]

Cross-examination.

(By Mr. PRESTON.)

I advised Mr. Jenkins that there being no provision for removal of the mill in the agreement that the property belonged to him. I advised him the mill would cover the building—that the mill was embedded upon the soil, or resting permanently on what was embedded in the soil. I never talked about the machinery, such as the trimmer, and the edger and the carriage. I told him that everything that would come under the description of fixtures would be, under the laws of the State of California, his. I did not put in the agreement any reference to the tractor and such things because I did not think it was necessary for us to exclude things that did not belong to him. When I wrote the completed

(Testimony of N. J. Barry.)

agreement and the bill of sale I cut out the logging equipment purposely. I told him I did not own it. I don't know where Mr. Soule is. I have not seen him for a year. Soule did not get the tractor and some logging equipment. There was no inventory made of the property that was not conveyed. I told Soule he got just what was in the bill of sale. I told him I never had been out there, and I didn't know what was fixtures but whatever there was belonging to Jenkins we were conveying that, and nothing more. He understood it that way. The reason I put in bunkhouses, appliances and the kitchen furniture was because they talked about those things. I told him it depended on how it was resting on the soil, how it was located, and if it belonged to him he conveyed it and if it didn't he didn't. By the words "personal property" I meant fixtures. I don't know what the object in bringing this suit was from Seehorn's standpoint. He didn't tell me where he was going to land or get off. He didn't say anything about where he was going to get off. I had no *interest it.* I never heard Jenkins tell Seehorn where [121] he was going to get off; and I don't know what you mean by "where he would get off." They didn't discuss it in my presence. I didn't hear anything at all as to any proposition or offer on the part of Seehorn in this matter and I didn't hear any proposition made by Jenkins to Seehorn in this matter. I did not hear any discussion about taking care of the creditors. Loosely called on me and my recollection is that I

(Testimony of N. J. Barry.)

told him I had heard Mr. Jenkins say that Mr. Loosely was a creditor. I knew of no creditors in the world except Loosely and Jim Humphries. I knew the legal proceeding would take over the mill and such things as under the laws of the State of California would be called fixtures. I do not realize that the contract provides only for forfeiture in case of failure to make the first payment. It says time is of the essence of the contract.

"Q. Is it true that there was no testimony given at that trial about the 15,000 shares and the first payment being made? A. I don't remember.

Q. Is it not a fact that the Court was not informed about the first payment being made in full?

A. I don't recollect as to that."

I don't know that the Court was misinformed about the first payment being made in full. I don't believe I knew, at that time, that Jenkins had any stock. I didn't know he was president of the company until this proceeding was started.

TESTIMONY OF EARL WHITLOCK, FOR DEFENDANT.

EARL WHITLOCK, being called and sworn, testified for the defendant as follows:

My name is Earl Whitlock. I reside at Klamath Falls, Oregon. I was acquainted with a corporation known as the McCollum-Christy Lumber Company. I was a stockholder in that corporation in and was on the Board of Directors and I was the secretary. The corporation operated in Grizzly Val-

(Testimony of Earl Whitlock.)

ley, Plumas County, California. They were engaged in the manufacture [122] of lumber. In 1922 we had several meetings with the directors relative to continuing the business of that corporation. We talked over things generally, including finances. I could not state whether there is any record in the minutes covering the meeting or not at that time. The first meeting held was a stockholders' meeting, after which informal directors' meetings were held. In the spring of 1922 I sent Jenkins a telegram relative to the condition of the business. At the stockholders' meeting, the meeting was called for the purpose of devising means to raise finances to carry on the operations. After the close of operations in the fall of 1921, the lumber did not bring enough to pay our debts and carry on the operations, so that it was necessary, we say, to devise means to raise further capital, if possible to pay the creditors and carry on the future operations. There was a call at that time, at that stockholders' meeting, for contributions to make up the deficiency and carry on the business. At that stockholders' meeting they were unable to get enough to do any good toward the continuance of the business. It was talked then among the directors in particular at the close of that meeting that the matter would be held off and we would see what we could do toward interesting outside people, or anything of that nature, after which numerous informal meetings of the directors, or of some of the directors, one plan and another was talked, all of which came

(Testimony of Earl Whitlock.)

to naught, and after much time and effort, in justice to Mr. Jenkins it was agreed that I wire him that there could be nothing done, and for him to take whatever action was necessary for him to protect himself. Mr. Jenkins had been very lenient with us. The contract had not been kept up, payments had not been made, and Mr. Jenkins had always been agreeable to allowing us additional time to take care of the matter. To my knowledge Mr. Jenkins was never a director of that corporation. [123] I am sure he was not. He took no active part as president. Mr. Seehorn was managing the business, ever since a former employee had been discharged. I had been trying to get financial statements of the business from Seehorn. I had forms printed of the daily cuts, the mill records, the forms were mailed to the office at the mill, but none were ever filed in my office as secretary. I never could get any statements or any returns.

Cross-examination.

(By Mr. PRESTON.)

I cannot tell definitely how long Seehorn ran the mill. Mr. Seehorn was in charge for two or three months. I was secretary of the company. I made numerous trips to the mill—two or three. I did not perform the clerical work of secretary. As far as the meetings were concerned, and that generally is all the part I took, but not as far as the operations of the mill were concerned, I did not perform anything as secretary. We had a bookkeeper. I was in business in Klamath Falls. That

(Testimony of Earl Whitlock.)

is about 190 miles from the mill site. I am an undertaker and county coroner. I made four trips to the mill site. That was before the 1922 sale to Soule. The stockholders' meeting in 1922 was in the first part of the year. It is possible that it was in December of 1921. It was held at my place in Klamath Falls, Oregon, and the financial condition of the company was discussed then and means were attempted to rehabilitate the finances of the company. It was taken up at that time to see if we could get the stockholders to raise enough money to pull the company out of the hole. I could not say that Jenkins was represented at that meeting. I cannot tell you how much money we were trying to raise at that time. I cannot say what our liabilities were. After the stockholders' meeting we had informal directors' meetings. We held these meetings first at one place and then at another. They were [124] at my place sometimes, at Dr. Merryman's office a time or two, and at attorney Merryman's office a time or two. All the directors did not reside in Klamath Falls. It was not a full meeting. It was a discussion between me and Merryman, Bert Sitzer and George Christy. I sent this telegram to Jenkins in 1922. I couldn't tell you the date. I haven't seen the telegram:

Counsel for plaintiff thereupon read the telegram to the witness as follows:

"Unable to get you on phone at San Francisco to-day Answering your wire to Merryman will say seems hopeless that anything will be done here

(Testimony of Earl Whitlock.)

Advise you take your own course in matter to best protect yourself Have done all in my power but to no effect.

EARL WHITLOCK."

That sounds like the wire. The Board of Directors authorized me to do that, I am sure of that, and I sent it as secretary, of the company. My testimony was taken in Marysville on the 30th day of March, 1923. I answered at that time as to this wire. I said I wired that as an individual and not as secretary of the company. I suppose I did if it is on the record. It was after conference with Christy and Sitzer and the books there at home; it was agreed that as this talk would go on that I was the one who was instrumental principally in going between the different ones.

"Q. Well, you didn't sign the wire as secretary?

A. No, perhaps not."

I had seen Jenkins before I sent that wire. I had seen him personally. I had talked to him of the concern generally but not relative to the condition of the company. I know a man by the name of Christy. He was vice-president of the company at the time I was secretary. On the 22d of March, when I sent that telegram, I had not been employed by Jenkins to find a purchaser. [125] I was employed at a time when Mr. Christy and I went to Reno. After my wire to Jenkins as I remember it. After my wire to Mr. Jenkins, as I remember it, and Mr. Christy, Mr. Johnson and I thought we would go up and take one more shot

(Testimony of Earl Whitlock.)

at Mr. Jenkins to see what could be worked out of the thing, at which time we went to Reno, the three of us, and saw Mr. Jenkins, and see if we could sell the plant for enough to pay the creditors, and what would be left over would be returned to the stockholders. We went from the standpoint of sacrificing the plant and at the same time making a sale whereby the stockholders could recover the balance between what was owed and what would be the selling price of the plant. Mr. Jenkins stated at that time in Reno, in the office of Mr. Barry where we had the meetings, that he had started proceedings, and that he would have to go through with his proceedings, that they were started to foreclose on this contract. I never saw Soule. I was not present when Soule signed the option. I could not tell the date when I was in Reno but as I remember it it was the first of April. I had word through Christy that Soule had been there on the 10th of April and signed the option with Jenkins at that time. I wasn't with Christy. Christy made a second trip. I have no record of the date of the filing of the suit although I was told it had been filed by Mr. Jenkins, that action had been started to foreclose on his contract, and he couldn't do anything for us now, and that the matter was closed. Jenkins said he was going to take the mill, that he was going to take action on his contract. He did not go into details. It was my general understanding that he was going to get the property. That was the way the contract read. I

(Testimony of Earl Whitlock.)

naturally thought that the loose property, like the logs, and the implements and the beds, and the typewriter and the tables, and the mattresses were covered in the contract. I suppose because [126] the payments were in arrears we would lose the mill and everything. That was the impression at the meeting. There was no talk of any recovery to the company at the meetings. We went to Reno to see if we could get out through Jenkins. We were looking to sell the plant for enough to pay the creditors and at the same time save something for the stockholders. There was an agreement, as I understand it, between Jenkins and Christy that if he wanted to sell he would make arrangements with him. The terms were discussed in my presence. He said he would give him $5,000 to find a buyer after he got the mill. As far as I know there was no discussion as to what was to be agreed to be in the sale. I heard the agreement between Christy and Jenkins. It was verbal. Christy then stated afterwards that he had no finances to make these trips; in fact, I had paid his way to Reno; he borrowed the money from me to pay his way to Reno on this trip, and he said that he would have to see Soule and make the trips back and forth, and if I would furnish the funds for him he would split the commission with me that he was to get. I was to get $2,500 and he $2,500. I have not a record but I think the total expenditure for the trip up there for him, and the numerous trips which he made, which were two or three, was be-

(Testimony of Earl Whitlock.)

tween $300 and $400. I received $2,000 from Jenkins and I believe Christy got $2,000. I was not looking out for the creditors all that time, the company had been closed. I do not know whether the suit had gone to judgment at that time or not. I don't know what became of the other $1000.

"Q. Do you claim $500 more off Jenkins?

A. I suppose he would pay $500 more."

The witness continues: The deal was principally through Christy. He stated to me that he had not received the other $500. When I was in Reno Soule [127] was a prospective purchaser. I could not tell you when Soule was first found. That was Christy's work. It was after I sent that wire, I never heard anything about it before. At the time I sent the wire on March 22d I was not looking for a commission because I made every effort to raise the money and hold the company intact because of the work I had put in on it. I saw it became impossible and in justice to Mr. Jenkins it was agreed that we should tell him. In Merryman's office it was agreed that we should tell him that he should do whatever was necessary to take care of himself. As secretary of the company to preserve the mill I think I put in a little more work than all the rest of them combined. Yes, I mean after the suit was filed. I went to Reno for the express purpose of seeing if the plant could be sold and the creditors paid, and the balance returned to the stockholders. There was no contract made at that time with me for any commission. I did nothing

(Testimony of Earl Whitlock.)

toward the defense to this suit. I thought the contract covered all of the personal and other property connected with the mill. I consulted Mr. Merryman and had him look it over. He was a stockholder and brother of a stockholder. He said there was no recourse if Mr. Jenkins wanted to close on the contract; that we lost it all. I could not say as to our rights to take the mill from one place to another. We had been having meetings in Mr. Merryman's office and Mr. Merryman had been instructed to write to Mr. Jenkins relative to what could be done. That was Merryman, the lawyer. Mr. Jenkins finally then, after a space of time, wired Mr. Merryman asking him if anything was going to be done, at which time Mr. Sitzer, Mr. Christy and I, as I recall it offhand, called at Merryman's office and we told him we could see no chance of anything being done and Merryman then stated we had better wire Jenkins. I don't know what was in the telegram from Jenkins to Merryman. [128] He wired Merryman from San Francisco, then Merryman asked me to answer and tell him there was not anything we could do. I tried to call him up at San Francisco but he had left, after which I sent him that wire to Reno. The company was insolvent at that time, practically. I was looking for something for the stockholders. I was not looking out for myself; I had nothing to do with it. There was no arrangement or agreement. I was looking for something for myself as a stockholder, naturally and I knew the concern

(Testimony of Earl Whitlock.)

was insolvent. At the time I sent the wire I did not know that Christy and I were going to hunt Soule and have him buy the place; absolutely not, Soule's name had never been mentioned. I didn't know of the man at all. I did not do anything to fight the lawsuit. As far as I know the creditors have not been paid. I owned $9,500 worth of stock for which I paid $9,500 cash money. I got back $2,000. I had numerous expenses back and forth to the mill and incidentals. At no time did I recover anything for expenses. Jenkins was president of this corporation.

TESTIMONY OF W. E. SEEHORN, FOR DEFENDANT (RECALLED).

W. E. SEEHORN, recalled for the defendant, questioned by Mr. BARRY.

It was constructed upon sills that were placed in the ground. By mill I mean mill building. The foundation was imbedded in the soil. We took a big log that was five feet in diameter and squared it up and set the engine on top of these logs and the engine was set on top of that and then screws screwed it down so as to hold it in place. This log was set on top of logs that were imbedded in the ground. The boiler was encased in brick. We had 18 inches of brick around the boiler to hold the heat, and an excavation made for it. I think there was a concrete foundation. The edgers and trimmer were set on the floor. They were bolted to the floor with screws. Some of them were hung from

(Testimony of W. E. Seehorn.)

above, the shafting [129] and all that sort of thing. They were screwed or bolted to the timbers comprising the mill. The ties for the track were laid on the top of the ground, most of them, the rails were on top of the ties. The rails were spiked together, spiked to the ties. Just the same as any other rail. Then we would move it from one track to the other. We didn't have enough to cover them all and we moved them from one to the other. The rails of the track were not attached to the mill. It ran up to the mill. The mill was up higher. The lumber was put down on another track; there were tracks in the mill than ran out to where we sorted the lumber. The rails were laid on the floor of the mill and spiked.

Cross-examination.

(By Mr. PRESTON.)

By carriage I mean the carriage that carries the logs to and from the saw; that runs by steam. It runs on a track. All you would have to do to remove the carriage and such things would be to take the wood screws out and move the machinery. The screws were screwed into the floor, sometimes it was on a board on top of the floor. Overhead there were braces for the purpose of holding the shafting. By releasing these screws and these bolts you could remove the machinery entirely out of the building without any injury to the building. The cabins were removable. They were set on posts so that you could put skids under them and move them. I think we moved some of them a short dis-

(Testimony of W. E. Seehorn.)

tance. There was not anything to damage the land if we moved this machinery and this mill site. We had four mill sites picked out on this property. I don't know whether Mr. Jenkins knew that or not. We would have to move the mill four times in order to cut this timber, in order to make cheap logging. We had a right to move the mill. He would not have any objections to that. Jenkins never claimed the mill. I don't think he ever disclaimed it either. [130]

Redirect Examination.

(By Mr. BARRY.)

We had three trucks there but we had sold those to a logger by the name of Winn. There was a big tractor there too but we sold that before we left the mill.

Recross-examination.

(By Mr. PRESTON.)

These tractors that had been sold were not included in the property left, but there was a small tractor left there.

Mr. PRESTON.—"If your Honor please, I have prepared a slight amendment to the main count in this complaint, so as to make the attack on the judgment a little more direct by a rewriting of paragraph VI. I have added to the complaint also a count for direct conversion and also an accounting for money had and received. It seems to me it would be appropriate to tender this amendment at this time, in order to conform to proof. Paragraph VI and other paragraphs in the complaint

do not in so many words make a direct attack upon this judgment as being fraudulent. I have made allegations appropriate, I think, to present that issue. I think, having taken the affirmative of the issue here, of the trusteeship of this defendant, who was president of the corporation, it is probably upon us to make an affirmative showing in respect to that judgment. We have it both ways. I would ask the permission of the court to file that, and will stipulate that the answer may stand as to it.

Mr. BARRY.—We object to the filing of any amendment. This case has been pending a long time. We are here to meet certain issues raised by the pleadings. [131]

Mr. PRESTON.—There is no surprise here, your Honor. We have not taken them by surprise. They plead this very judgment.

The COURT.—Well, I will see. It may be offered. The Court will take it under advisement with the whole case.

Mr. PRESTON.—All right, your Honor. And if it is admitted, the answer may be deemed to deny it.

The COURT.—If it is simply to conform to the proof proffered in the case it would not make much difference one way or the other. *I* can be taken under advisement.

Thereafter and on the 15th day of December, 1924, the Court decided said case in favor of the plaintiff and against the defendant herein and rendered an opinion as follows:

"United States District Court, California.

No. 17,076.

BOYD, Trustee of Bankrupt,

vs.

JENKINS.

The case is simple enough, the facts free from material conflict, and little detail of evidence is required from a busy trial court. The contract between defendant and bankrupt created a mixed relation between them in some part that of vendor and vendee, landlord and tenant, and licensee. To enjoy the premises exclusively for ten years growth of timber, portions likewise for mills and other facilities of enjoyment of the purchase, created a tenancy despite the [132] negative words in the contract. Terms, not labels, give character to relations.

But whether tenancy or mere license, local as well as general law attached right to remove mill and other facilities within or at end of contract period, and nothing in the contract indicates any contrary intent in the parties. In so far as the forfeiture clause upon default in first payment goes, no default occurred and the clause is not material.

Likewise immaterial is the question whether removal must occur *before* contract terminated or could be done *after* that time. The reason subsists in the relations between defendant and bankrupt;

the former president of the latter and also owner of the land on which were mill, etc.

For his duty as president, to guard the interest of the then insolvent bankrupt—insolvency known to him, and its creditors, required that he timely cause to be removed if necessary, the mill, etc. Failing to do so, he cannot take advantage of this, his wrong, and successfully assert that as owner of the land he became owner of the mill, etc. by reason of his failure to timely cause them to be removed as was his duty as aforesaid. This is elementary and the principal is illustrated by innumerable cases, corporation and others.

So it is immaterial here whether the contract was really terminated, whether the bankrupt owes anything to defendant, or *vice versa,* for breach; the duty of defendant is the same in any case.

So far as time was of the essence, defendant waived it by delay after default, by consent to changes and modifications, by recognizing continuance of the contract, and by demand for payment as of a debt due. As before stated, no forfeiture occurred. Hence, the judgment based thereon and procured in a state court by defendant upon allegations that [133] he had not been paid the first payment, is founded upon falsehood, collusion and fraud, and defendant will be permitted no benefit or advantages by reason of it.

See Smith vs. Smith, 224 Fed. 3, and cases by it cited.

Incidentally, the proceedings of that judgment

could well be the basis of other proceedings by the state court and public prosecutor.

In respect to logs and lumber on hand, they were not counted upon in the case as brought and tried, and are not *here,* at least, to be taken into account.

If any of the defendant's timber was converted and by labor transformed into buildings by the bankrupt, its value does not appear and no account can be taken of it.

The evidence is ample that defendant seized and possessed, exercised dominion over, converted and contracted to sell the mill and all the bankrupt's property upon the premises and of value $50,000.00

That the later executed a bill of sale that *may* exclude same, is too late, does not cure conversion, and is immaterial.

The court finds for plaintiff and against defendant, in amount $50,000.00, legal interest from June 23, 1922, and costs; and thereupon concludes plaintiff is entitled to recover of and from defendant accordingly.

If defendant desires more specific findings, plaintiff will submit them to conform hereto and on notice. So far as necessary the amended complaint is allowed. Judgment accordingly.

BOURQUIN, J.

[Endorsed]: Decision. Filed Dec. 15, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk." [134]

The above and foregoing bill of exceptions contains all of the evidence of every kind, character

and description whatsoever, given or introduced and all of the proceedings had upon the trial of the said action. (Saving and excepting a tabulation attached to Exhibits Numbers 1, 6 and 11, containing the kind and amount of the timber, according to the cruise thereof, standing upon the lands described in said exhibits, and giving the description of the said lands, which tabulations were omitted by stipulations of counsel upon the understanding that if at any stage of this case such tabulations are needed they shall be prepared and certified to the Appellate Court.) Now and within the time allowed by law, as extended by the parties hereto and the orders of this court duly and regularly made in this behalf, the defendant hereby presents the above and foregoing as and for his engrossed bill of exceptions and prays that the same may be settled, allowed, signed and authenticated by this court as in proper form and as conforming to the truth and as the true bill of exceptions herein, and that it may be made a part of the record in this action.

Dated this 26th day of February, 1925.

N. J. BARRY,
DALY B. ROBNETT,
Attorneys for Defendant. [135]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys respectively for plaintiff and defendant in the above-entitled action that the above and foregoing is an engrossed bill of exceptions in said matter and that the same contains all the evidence of every kind

and character and description whatsoever, given or introduced and all of the proceedings had upon the trial of said action, saving and excepting a tabulation attached to Exhibits Numbers 1, 6 and 11, containing the kind and amount of the timber, according to the cruise thereof, standing upon the lands described in said exhibits, and giving the description of the said lands, which tabulations were omitted by stipulations of counsel, upon the understanding that if at any stage of this case such tabulations are needed they shall be prepared and certified to the Appellate Court for its consideration. We hereby consent to the court hereby settling, allowing, signing and authenticating said foregoing engrossed bill of exceptions herein, and that it may be made a part of the record in this action.

Dated this 6th day of March, 1925.

JOHN W. PRESTON,
MILTON NEWMARK and
CLARENCE A. SHUEY,
Attorneys for Plaintiff,
N. J. BARRY,
DALY B. ROBNETT,
Attorneys for Defendant. [136]

I hereby certify the foregoing to be a true and correct statement of all the evidence and proceedings had upon the trial of the above-entitled action, and the foregoing is hereby settled and allowed as and for the authenticated bill of exceptions in said action.

Dated this 9 day of March, 1925.

BOURQUIN,
Judge.

Service of the within document and receipt of a copy is admitted this 6th day of March, 1925.

JOHN W. PRESTON,
MILTON NEWMARK and
CLARENCE A. SHUEY,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 10, 1925. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [137]

In the Southern Division of the United States District Court, in and for the Northern District of California.

No. 17,076.

J. O. BOYD, as Trustee of the Estate of McCOLLUM–CHRISTY COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

REES T. JENKINS,

Defendant.

ASSIGNMENT OF ERRORS.

Now comes the defendant in the above-entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the writ of error in the above-entitled cause, from

the decree made by this Honorable Court on the —— day of December, 1924.

1. That the United States District Court for the Northern District of California erred in overruling the objection to the following question and answer, asked of the witness W. E. Seehorn:

> Q. "In any conversation he ever had with you, at any time, did he ever claim the mill—I mean prior to this judgment?
>
> Mr. BARRY.—Objected to as immaterial, under this contract.
>
> The COURT.—Objection overruled." [138]

2. The Court erred in overruling the objection to the following question, asked of the witness W. E. Seehorn:

> Q. "I will ask you whether or not $50,000 was a reasonable or an unreasonable price on the 6th day of June, 1922, for that property?
>
> Mr. BARRY.—Just a moment. That is objected to as immaterial.
>
> The COURT.—The objection is overruled and an exception will be noted. If not material the Court will give it no consideration."

3. The Court erred in overruling the objection to the following question asked of the witness E. M. Neese:

> Q. "Turn to ledger account No. 41—
>
> The COURT.—What is this evidence for?
>
> Mr. PRESTON.—This is to show what the items were that there were on hand that comprised what was sold, and what their cost price was.

Mr. BARRY.—I object to that as immaterial.

Mr. PRESTON.—That is one way of getting at what was there.

The COURT.—It is a circumstance that can be introduced. Objection overruled. In so far as not material, the Court will give it no consideration."

4. The Court erred in overruling the objection of defendant to the following question asked of the witness Earl Whitlock:

Q. "Is it your understanding that when a man puts a sawmill on another man's property that he loses it when the timber is cut?

Mr. BARRY.—I object to that, your Honor, as a question of law.

The COURT.—I think so, but it has some bearing on the question of good faith, and the sufficiency of the witness' efforts later on. Objection overruled and an exception noted. In so far as not material or competent, the Court will give it no consideration." [139]

5. The Court erred in allowing the following application of the plaintiff, over the objection of the defendant:

Mr. PRESTON.—"If your Honor please, I have prepared a slight amendment to the main count in this complaint, so as to make the attack on the judgment a little more direct by a re-writing of paragraph VI. I have added to the complaint also a count for direct conversion and also on accounting for money had

and received. It seems to me it would be appropriate to tender this amendment at this time, in order to conform to the proof. Paragraph VI and other paragraphs in the complaint did not in so many words make a direct attack upon this judgment as being fraudulent. I have made allegations appropriate, I think, to present that issue. I think, having taken the affirmative of the issue here, of the trusteeship of this defendant, who was president of the corporation, it is probably upon us to make an affirmative showing in respect to that judgment. We have it both ways. I would ask the permission of the Court to file that, and will stipulate that the answer may stand as to it.

Mr. BARRY.—We object to the filing of any amendment. This case has been pending a long time. We are here to meet certain issues raised by the pleadings.

Mr. PRESTON.—There is no surprise here, your Honor. We have not taken them by surprise. They plead this very judgment.

The COURT.—Well, I will see. It may be offered. The Court will take it under advisement with the whole case.

Mr. PRESTON.—All right, your Honor. And if it is admitted, the answer may be deemed to deny it.

The COURT.—If it is simply to conform to the proof proffered in the case it would not make much difference one way or the other. It can be taken under advisement." [140]

6. The Court erred in its opinion and decision, made and filed in said cause on the 15th day of December, 1924, in holding that the contract between defendant and bankrupt created a mixed relationship between them, in some part that of vendor and vendee, landlord and tenant and licensee, in this:

(A.) The contract specifically provided that the relationship of landlord and tenant did not exist.

(B.) Under the decisions of the Supreme Court of California such a contract is held to be that of vendor and vendee, and not that of landlord and tenant.

(C.) That by the terms of said contract an option to purchase was created, and not the relationship of landlord and tenant.

7. The Court erred in holding in its opinion and decision that said contract created a tenancy, despite the words of the contract, in this:

(A) That such contracts have been held, by the decisions of the Supreme Court of the State of California, to create the relationship of vendor and vendee.

(B) That such contracts have been held, by the decisions of the Supreme Court of the State of California, to create an option to purchase, and create the relationship of optionor and optionee.

8. The Court erred in holding in its opinion and decision that the general law gave the bankrupt a right to remove the mill and other facilities within

or at the end of the contract period in this: The Statutes of the State of California provide that when one party affixes his property to the lands of another, without an agreement to remove, such property becomes the property of the owner of the land.

9. The Court erred in holding in its opinion and decision that nothing in the contract indicates any contrary intent in the parties, in this: [141]

(A) Under the Statutes of the State of California it was the duty of the vendee to have inserted in the contract a provision for the removal of this property.

(B) The contract specifically provides that at the termination of this contract, for any cause, the property shall be returned to the vendor in as good state and condition as the same was at that time of entering into the contract, or might thereafter be put into.

9. The Court erred in its opinion and decision in holding that in so far as the forfeiture clause upon default in first payment goes, no default occurred and the clause is not material, in this:

(A) That the forfeiture did not depend on the default of the first payment but provided that time was of the essence of the contract, and that upon a failure to promptly comply with the conditions of the contract the vendor would be released from all obligation in law or equity to further perform the contract.

(B) The contract also provided that the property would be left in as good condition as

the same was or might thereafter be put into.

(C) The Supreme Court of the State of California, in its decisions, holds that time is always of the essence of option contracts and that a failure on the part of the optionee to do any of the things called for by the contract promptly, terminates the contract and effects a forfeiture.

10. The Court erred in holding, in its opinion and decision, as immaterial the question of whether removal must occur before the contract terminated or could be done after that time, in this:

If the relationship of landlord and tenant existed, as held by the Court, under the provisions of the Statutes of the State of California, the removal must be made before the termination of the tenancy.

11. The Court erred, in its opinion and decision, in holding that the reason subsists in the relations between [142] defendant and bankrupt; the former president of the latter and also owner of the land on which were mill, etc., in this:

(A) There is no law prohibiting the president of a corporation from contracting with the corporation if his actions be free from fraud. No fraud was alleged nor proven in this case.

(B) The law is that any officer of a corporation may deal with such corporation where he does not assume to act in his official capacity, or do anything representing the corporation in the deal but simply represents the

other side of the deal, and the corporation is represented by some proper officer.

12. The Court erred, in its opinion and decision, in holding that the defendant, as president, was in duty bound to guard the interests of the insolvent bankrupt, in this:

The testimony shows that defendant was never the acting president of the corporation, and at no time had anything to do with the management thereof, but, on the contrary, shows that W. E. Seehorn was the actual manager.

13. The Court erred in holding that the insolvency of the corporation was known to the defendant, in this:

There is no testimony showing that the defendant ever knew that the corporation ever was insolvent.

14. The Court erred in holding that the defendant, as president, was required to timely cause to be removed, if necessary, the mill, etc., in this:

(A) Under the law there was no such duty on the part of the president of the corporation in this case, for the reason that he was not the acting manager of said corporation.

(B) In any case, he would have had no more right than the corporation—and the corporation, under the laws of the State of California, would have had no right to remove.

(C) The bankrupt, having failed to have inserted in the contract a clause for the removal, the mill, became the property of the owner of the land, and no act of the corpora-

tion, or its president, could have changed that condition. [143]

(D) That under the terms of the contract the mill, and other property, which was affixed to the land immediately became the property of Jenkins, the owner of the land and the corporation and its officers had no authority to remove any of such property, or disturb the possession of Jenkins.

(E) The defendant had the same right to assert his rights, under the contract, that a mortgage would have had.

(F) In the asserting of his rights Jenkins did not act as president of the corporation but took the matter up in his individual capacity, with the directors of the corporation.

15. The Court erred in finding that defendant could not take advantage of his own wrong and successfully assert that he had become the owner of the mill, in this:

(A) He was guilty of no wrong.

(B) He was dealing with the corporation individually and not as president.

(C) The agreement was made with the corporation at a time when Jenkins was not president.

16. The Court erred in finding that it was the duty of the defendant to timely cause the property to be removed, in this:

(A) The agreement was made with the corporation in perfect good faith and there was no dispute on this point. He, therefore, had

the right to follow any remedy given him by the law, the same as though he were not president of the corporation and to assert any rights given him by the contract as an individual.

17. The Court erred in holding that it was immaterial here whether the contract was really terminated, whether the bankrupt owes anything to defendant, and that the duty of defendant is the same *is* any case, in this:

The above holding is in total disregard of the contract and the Court failed to give the contract any effect whatever. The contract defined the rights of the parties. On the breach thereof defendant was entitled to [144] assert any rights given him under the law and the contract, and it was material to know whether or not the payments had been made, or whether or not the contract had been terminated by default, and to define defendant's right on such default.

18. The Court erred in holding that so far as time being of the essence defendant waived it by delay after default, by consent to changes and modifications, by recognizing continuance of the contract, and by demand for payment as of a debt due, in this:

(A) No waiver was plead or claimed.

(B) There was no appreciable delay after default.

(C) There were no changes or modifications, or recognition of the continuance of the contract after default.

(D) Demand for payment was not a waiver of the default but was a notice to the bankrupt that the defendant intended to declare and claim a forfeiture.

19. The Court erred in holding that the judgment in Plumas County was founded on falsehood, collusion and fraud, in this:

(A) Even though the judgment was procured upon perjured testimony it cannot be attacked in this court, but should have been attacked in the state court by motion for a new trial. The only fraud that would vitiate a judgment would be a collateral fraud in procuring the defendant in such suit to fail to appear. It is not fraud that is perpetrated upon the trial court but is perpetrated upon the defendant to keep him from appearing in court.

(B) The findings of the Superior Court in Plumas County shows that the bankrupt was in default in a sum exceeding $50,000.

(C) The Court was in error in not giving effect to the Plumas County judgment as a bar to this proceeding for the reason that no fraud in securing the judgment in Plumas County was pleaded or proven in this case. The only fraud alleged was in letting a default be taken, and the evidence was insufficient to show any fraud in procuring such default and the testimony showed that the bankrupt had no defense to the Plumas County case. [145]

20. The Court erred in finding that no account could be taken of the lumber and logs on hand for

the reason that the value thereof was not shown by the defendant, in this:

(A) This is an action of conversion for property alleged to have been converted by the defendant. The testimony shows that everything on the lands constructed of lumber was made from the timber standing on the lands of defendant. There was no duty on defendant to show the value of the timber. It was defendant's own timber. He was the owner of it and there is no way in which its value could be material. In order to get a judgment for conversion it was incumbent upon the plaintiff to show the value of the timber, and that it was their timber.

(B) Under the decisions of the Supreme Court of the United States the timber and everything created by it belonged to the defendant until paid for. The testimony shows that there was $12,500 worth of timber cut by the bankrupt, and not paid for.

21. The Court erred in finding that the evidence was ample to show that defendant seized and possessed, exercised dominion over, converted and contracted to sell the mill and all the bankrupt's property on the premises to the value of $50,000, in this:

(A) The mill, under the laws of the State of California, belonged to Jenkins, it having been placed on his land without an agreement to remove it.

(B) The mill was constructed out of lumber

sawed from the timber of the defendant, and for which no price was paid.

(C) Defendant did not sell anything but the mill.

(D) The testimony fails to show that defendant ever had in his possession, or exercised any dominion over, any property upon the premises other than the selling of the mill.

(E) The testimony fails to show that the trustee in bankruptcy ever made any attempt to take possession of the personal property, or the mill, or ever made any demand on the defendant, or anyone else, for any property which belonged to the bankrupt. [146]

(F) That the mill building was permanently affixed to the soil, and that the mill machinery, boiler, engine and other equipment was permanently attached to the mill building, or to things otherwise permanently affixed to the soil, and under the Statute of the State of California this made the mill, the mill machinery, boiler, engine, and equipment a part of the realty, and became the property of the defendant the instant it was so affixed, both under the law and under the contract.

(G) There was no competent testimony showing the value of any property belonging to the bankrupt.

22. The Court erred in finding for plaintiff and against defendant in amount $50,000 with legal interest from June 23, 1922 and costs, in this:

(A) There was no testimony that defendant ever converted or had in his possession any property that was the property of the plaintiff.

(B) There is no competent testimony that any property of plaintiff, involved in this action, was of the value of $50,000 or any other value.

WHEREFORE, defendant prays that said decree be reversed, and that said District Court for the Northern District of California be ordered to enter a decree reversing said decision.

N. J. BARRY,
DALY B. ROBNETT,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 19, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [147]

In the Southern Division of the United States District Court, in and for the Northern District of California.

No. 17,076.

AT LAW—No. 17,076.

J. O. BOYD, as Trustee of the Estate of McCOLLUM-CHRISTY LUMBER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

REES T. JENKINS,

Defendant.

PETITION FOR WRIT OF ERROR.

Now comes Rees T. Jenkins, defendant herein, and says that on or about the 18th day of December, 1924, this Court entered judgment herein in favor of the plaintiff and against defendant, in which judgment and proceeding had prior thereto, in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

N. J. BARRY,
DALY B. ROBNETT,
Attorneys for Defendant. [148]

Upon motion of N. J. Barry and D. B. Robnett, solicitors and counsel for defendant, IT IS HEREBY ORDERED that a writ of error, from the decree heretofore filed and entered, be, and the same is, hereby allowed, and that a certified transcript of the record, testimony, stipulations and all proceedings be forthwith transmitted to the Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond of appeal

be fixed at the sum of $72,000.00, the same to act as a supersedeas bond and also as a bond for cost and damages on appeal.

Dated this 19th day of December, 1924.

JOHN S. PARTRIDGE,
Justice.

[Endorsed]: Filed Dec. 19, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [149]

(Title of Court and Cause.)

(The Premium Charged for This Bond is $720.00 Dollars per Annum.)

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That I, Rees T. Jenkins, as principal, and Fidelity and Deposit Company of Maryland, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and authorized to do and doing a surety business in the State of California, as surety are held and firmly bound unto J. O. Boyd, as trustee of the Estate of McCollum-Christy Lumber Company, a corporation, bankrupt, in the full and just sum of Seventy-two Thousand Dollars ($72,000.00) lawful money of the United States of America to be paid to said J. O. Boyd, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs,

executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of January 1925.

WHEREAS, lately at a District Court of the United States, for the Northern District of California, in a suit depending in said court between J. O. Boyd, as Trustee of the Estate of McCollum-Christy Lumber Company, a corporation, bankrupt, Plaintiff, and Rees T. Jenkins, Defendant, a judgment was rendered against the said Rees T. Jenkins, and the said defendant having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said plaintiff, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in the State of [150] California.

NOW THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said defendant shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

The undersigned do hereby expressly covenant and agree that in case of a breach of said or any condition of this bond, this Court may, upon notice to them of not less than ten (10) days proceed summarily in the above-entitled action, to ascertain the amount which they are bound to pay on

account of such breach and render judgment therefor for against them and award execution therefor.

REES T. JENKINS,
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By E. W. SWINGLEY,
Attorney-in-Fact.
[Seal] Attest: E. K. McCORRY,
Agent.

State of California,
City and County of San Francisco,—ss.

On this 16th day of January, A. D. 1925, before me, J. G. Roberts, a notary public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared E. W. Swingley, Attorney-in-Fact, and E. K. McCorry, Agent, of the Fidelity and Deposit Company of Maryland, a corporation known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the attorney-in-fact and agent respectively of said corporation, and they, and each of them, acknowledged [151] to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as attorney-in-fact and agent respectively.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in

the City and County of San Francisco the day and year first above written.

J. G. ROBERTS,

Notary Public in and for the City and County of San Francisco, State of California,

Approved:

JOHN S. PARTRIDGE,

Judge.

[Endorsed]: Filed Jan. 17, 1925. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [152]

(Title of Court and Cause.)

PRAECIPE FOR RECORD ON WRIT OF ERROR.

To the Clerk of Said Court:

Sir: Please prepare transcript and record for hearing of the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, including therein the following:

1. Plaintiff's complaint.
2. Defendant's amended answer.
3. Plaintiff's amended complaint.
4. Judgment.
5. Bill of exceptions.
6. Petition for a writ of error, and order granting same and fixing amount of supersedeas bond.
7. Assignment of error.
8. Writ of error.

9. Citation on writ of error.
10. Supersedeas bond and order approving same.
11. Praecipe.

Dated this 10th day of March, 1925.

N. J. BARRY and
DALY B. ROBNETT,
Attorneys for Defendant.

Receipt of a copy of the within praecipe is admitted this 10th day of March, 1925.

JOHN W. PRESTON,
MILTON NEWMARK and
CLARENCE A. SHUEY,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 11, 1925. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. [153]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred fifty-three (153) pages, numbered from 1 to 153, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the Clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $69.10; that said amount was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunder set my hand and affixed the seal of said District Court this 17th day of March, A. D. 1925.

[Seal] WALTER B. MALING,

Clerk United States District Court, Northern District of California. [154]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Rees T. Jenkins, plaintiff in error, and J. O. Boyd, as Trustee of the Estate of McCollum-Christy Lumber Company, a corporation, bankrupt, defendant in error, a manifest error hath happened, to the great damage of the said Rees T. Jenkins, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice

done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 19th day of December, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, for the Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by:

JOHN S. PARTRIDGE,
United States District Judge. [155]

RETURN TO WRIT OF ERROR.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk, U. S. District Court for the Northern District of California.

[Endorsed]: No. 17,076. United States District Court for the Northern District of California. Rees T. Jenkins, Plaintiff in Error, vs. J. O. Boyd, as Trustee, etc., Defendant in Error. Writ of Error. Filed Dec. 20, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Service of the within by receipt of a copy is admitted this 19th day of December, 1924.

JOHN W. PRESTON,
MILTON NEWMARK and
CLARENCE A. SHUEY,
Attorneys for Plaintiff.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States, to J. O. Boyd, as Trustee of the Estate of McCollum-Christy Lumber Company, a Corporation, Bankrupt, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein Rees T. Jenkins is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 19th day of December, A. D. 1924.

JOHN S. PARTRIDGE,
United States District Judge. [156]

[Endorsed]: No. 17,076. United States District Court for the Northern District of California. Rees T. Jenkins, Plaintiff in Error, vs. J. O. Boyd,

as Trustee of McCollum-Christy Lumber Company, a Corporation, Bankrupt, Defendant in Error. Citation on Writ of Error. Filed Dec. 20, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Service of the within by receipt of a copy is admitted this 19th day of December, 1924.

JOHN W. PRESTON,
MILTON NEWMARK and
CLARENCE A. SHUEY,
Attorneys for Plaintiff.

[Endorsed]: No. 4530. United States Circuit Court of Appeals for the Ninth Circuit. Rees T. Jenkins, Plaintiff in Error, vs. J. O. Boyd, as Trustee of the Estate of McCollum-Christy Lumber Company, a Corporation, Bankrupt, Defendant in Error. Transcript of Record. Upon Writ of Error to the Northern Division of the United States District Court of the Northern District of California, Second Division.

Filed March 17, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.